

ORAL ARGUMENT NOT YET SCHEDULED

No. 09-1038

(and consolidated cases Nos. 15-1083, 15-1085, 15-1088, 15-1089, and 15-1094)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

AMERICAN PETROLEUM INSTITUTE, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

ON PETITIONS FOR REVIEW OF FINAL REGULATIONS PROMULGATED
BY THE ENVIRONMENTAL PROTECTION AGENCY

OPENING BRIEF OF INDUSTRY PETITIONERS

**(AMERICAN PETROLEUM INSTITUTE; UTILITY SOLID WASTE
ACTIVITIES GROUP, *et al.*; FREEPORT-MCMORAN INC.; and
NATIONAL ASSOCIATION OF MANUFACTURERS and AMERICAN
CHEMISTRY COUNCIL)**

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June 20, 2016
(Final Brief)

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioners American Petroleum Institute, Utility Solid Waste Activities Group, Edison Electric Institute, National Rural Electric Cooperative Association, American Gas Association, Freeport-McMoRan Inc., National Association of Manufacturers, and American Chemistry Council (collectively, “Petitioners”) submit this certificate as to parties, rulings, and related cases:

(A) **Parties and Amici.** These consolidated cases involve six separate petitions for review of final actions of the U.S. Environmental Protection Agency. Accordingly, the requirement of Circuit Rule 28(a)(1) to list the parties, intervenors, and *amici* that appeared in the court below does not apply. The parties and entities moving to intervene and to participate as *amici* in this Court are listed below.

Parties:

Petitioner in No. 09-1038 is American Petroleum Institute.

Petitioners in No. 15-1083 are Utility Solid Waste Activities Group, Edison Electric Institute, National Rural Electric Cooperative Association, and American Gas Association.

Petitioner in No. 15-1085 is the American Petroleum Institute.

Petitioner in No. 15-1088 is Freeport-McMoran Inc.

Petitioners in No. 15-1089 are the National Association of Manufacturers and the American Chemistry Council.

Petitioners in No. 15-1094 are California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Louisiana Environmental Action Network, and Sierra Club.

Respondent in all cases is the U.S. Environmental Protection Agency.

Gina McCarthy, Administrator of the U.S. Environmental Protection Agency, is an additional Respondent in Nos. 15-1089 and 15-1094.

Intervenors:

Respondent-Intervenors in these consolidated cases are: American Chemistry Council; American Coke and Coal Chemicals Institute; American Gas Association; American Petroleum Institute; California Communities Against Toxics; Clean Air Council; Coalition For A Safe Environment; Edison Electric Institute; Environmental Technology Council, Inc.; Freeport-McMoRan Inc.; Louisiana Environmental Action Network; Metals Industries Recycling Coalition; National Association of Manufacturers; National Mining Association; National Rural Electric Cooperative Association; Sierra Club; Society of Chemical Manufacturers and Affiliates; and Utility Solid Waste Activities Group.

Movant-Intervenor in No. 09-1038 is Gulf Chemical and Metallurgical Corporation.

Amici Curiae:

At present, no entities are participating as *amici curiae*.

(B) **Rulings under review.** These consolidated cases involve petitions for review of two final actions of the Administrator of the U.S. Environmental Protection Agency, published in the Federal Register as: *Revisions to the Definition of Solid Waste*, 73 Fed. Reg. 64,668 (Oct. 30, 2008); and *Definition of Solid Waste*, 80 Fed. Reg. 1694 (Jan. 13, 2015).

(C) **Related cases.** These cases were not previously before this Court or any other court. At this time, to the knowledge of undersigned counsel, there are no other related cases currently pending in this Court or any other court.

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CORPORATE DISCLOSURE STATEMENTS

Petitioners submit the following statements pursuant to D.C. Circuit Rule 26.1:

American Chemistry Council: The American Chemistry Council (“ACC”) represents the leading companies engaged in the business of chemistry, including by participating on behalf of its members in administrative proceedings before EPA and in litigation arising from those proceedings that affects member company interests. The business of chemistry is an \$801 billion enterprise and a key element of the nation’s economy. ACC has no parent company, and no publicly held company has a 10% or greater ownership interest in ACC.

American Gas Association: American Gas Association (“AGA”) is the national association of natural gas utilities with no parent company, subsidiaries or affiliates. AGA does not have any outstanding shares or debt securities in the hands of the public and no publicly-owned company has a 10% or greater ownership interest in AGA.

American Petroleum Institute: API represents over 625 member companies in all aspects of the oil and gas industry, including science and research, exploration and production of oil and natural gas, transportation, refining of crude oil and marketing of oil and gas products. API’s members are leaders of a technology-driven industry that supplies most of America’s energy, supports more

than 9.8 million jobs and 8 percent of the U.S. economy, and, since 2000, has invested nearly 2 trillion dollars in U.S. capital projects to advance all forms of energy, including alternatives. API is a continuing association operated for the purpose of promoting the general commercial, regulatory, legislative, or other interests of the membership. API is a “trade association” within the meaning of Circuit Rule 26.1. API has no parent companies. No publicly held company has a 10 percent or greater ownership interest in API.

Edison Electric Institute: The Edison Electric Institute (“EEI”) is the national association of investor-owned electric utility companies with no parent company, subsidiaries or affiliates. EEI does not have any outstanding shares or debt securities in the hands of the public and no publicly-owned company has a 10% or greater ownership interest in EEI.

Freeport-McMoRan Inc.: Freeport-McMoran Inc. (“Freeport”) is a publicly traded corporation organized under the laws of the State of Delaware and headquartered in Phoenix, Arizona, whose securities are listed on the New York Stock Exchange (NYSE: FCX). Freeport is a natural resource company with a global portfolio of mineral assets and oil and natural gas resources. Freeport has no parent companies, and no publicly-held corporation has a 10% or greater ownership interest in it.

National Association of Manufacturers: The National Association of Manufacturers (“NAM”) is the nation’s largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM’s mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America’s economic future and living standards. The NAM has no parent company, and no publicly-held company has a 10% or greater ownership interest in the NAM.

National Rural Electric Cooperative Association: The National Rural Electric Cooperative Association (“NRECA”) is the nonprofit national trade association for electric cooperatives. On behalf of its members, NRECA participates in administrative and judicial proceedings involving or affecting its members’ interests. NRECA has no parent company. No publicly held company has a 10% or greater ownership interest in NRECA. NRECA is an unincorporated entity.

Utility Solid Waste Activities Group: The Utility Solid Waste Activities Group (“USWAG”) is an association of approximately one hundred and ten individual electric utilities, as well as EEI, NRECA, and AGA that represents the electric and gas utility industry on rulemaking and administrative proceedings

before EPA under the Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*, and in litigation arising from such proceedings that affect its members.

USWAG members are affected by the final action of the United States

Environmental Protection Agency (“EPA”) that is challenged in this proceeding.

USWAG has no parent company. USWAG does not have any outstanding shares or debt securities in the hands of the public and no publicly-owned company has a 10% or greater ownership interest in USWAG.

Date: June 20, 2016

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GLOSSARY

As used herein,

API means petitioner American Petroleum Institute;

EPA means respondent United States Environmental Protection Agency;

JA means the Joint Appendix; and

RCRA means the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k.

JURISDICTIONAL STATEMENT

The Court has jurisdiction because these consolidated cases involve timely petitions for review of EPA final rules issued under the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6901-6992k; *see also id.* § 6976(a). Case 09-1038 (filed Jan. 27, 2009) seeks review of the rule published at 73 Fed. Reg. 64,668 (Oct. 30, 2008), JA 65-185. Cases 15-1083 (filed Apr. 9, 2015), 15-1085 (Apr. 10, 2015), 15-1088 and 15-1089 (both Apr. 13, 2015) seek review of the rule published at 80 Fed. Reg. 1694 (Jan. 13, 2015), JA 265-385.

STATEMENT OF THE ISSUES

RCRA authorizes EPA to regulate “discarded” materials. 42 U.S.C. § 6903(27). The questions presented are whether EPA’s rules exceed its statutory authority, are arbitrary or capricious, or otherwise not in accordance with law because:

- (1) EPA’s four mandatory “legitimacy factors” impose affirmative RCRA duties and conditions on in-process materials that are not “discarded”;
- (2) EPA imposed the legitimacy factors on (a) pre-2008 exclusions without a record basis; and (b) used-oil recycling without notice or opportunity for comment and contrary to statute;
- (3) The verified recycler exclusion imposes RCRA regulation upon materials transferred for recycling that are not “discarded”; and

(4) EPA asserts RCRA authority over off-specification products that are used in their normal manner (and not “discarded”).

STATUTES AND REGULATIONS

Pertinent provisions are reproduced in Addendum 1.

STATEMENT OF THE CASE

This case again calls on this Court to enforce clear statutory limits on EPA’s RCRA jurisdiction to regulate “solid waste,” a term Congress defined to mean “discarded” material. Petitioners challenge two final EPA rules asserting RCRA jurisdiction over materials (including in-process materials and intermediates) that are processed into valuable products—not “disposed of, abandoned, or thrown away.” *See* Revisions to the Definition of Solid Waste, 73 Fed. Reg. 64,668 (Oct. 30, 2008) (“2008 rule”); Definition of Solid Waste, 80 Fed. Reg. 1694 (Jan. 13, 2015) (“2015 rule”).

I. EPA’s RCRA Jurisdiction Is Limited To “Discarded” Materials.

RCRA authorizes EPA “to regulate solid and hazardous waste.” *API v. EPA*, 683 F.3d 382, 384 (D.C. Cir. 2012) (“*API III*”). The statute defines “hazardous waste” as “solid waste” that may pose a danger to human health or the environment. 42 U.S.C. § 6903(5). “Hazardous waste” is subject to a range of stringent regulatory obligations, governing generation, treatment, storage, disposal, and permitting. *See id.* § 6924.

Because by statute “hazardous waste” is a subset of “solid waste,” “EPA’s jurisdiction is limited to those materials that constitute ‘solid waste.’” *American Mining Cong. v. EPA*, 824 F.2d 1177, 1179 (D.C. Cir. 1987) (“*American Mining*”). RCRA defines “solid waste” as: “garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material*.” 42 U.S.C. § 6903(27) (emphasis added). “Congress [thereby] clearly and unambiguously expressed its intent that ‘solid waste’ (and therefore EPA’s regulatory authority) be limited to materials that are ‘discarded’ by virtue of being disposed of, abandoned, or thrown away.” *American Mining*, 824 F.2d at 1193.

This Court has repeatedly applied this plain-language definition of “solid waste” to limit EPA’s RCRA jurisdiction to materials actually “disposed of, abandoned, or thrown away”—not materials productively reused or recycled. *See id.*; *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1268 (D.C. Cir. 2003). EPA regulations define “solid waste” both affirmatively (what *is* “solid waste,” 40 C.F.R. § 261.2) and negatively (what is *not* solid waste, through exclusions, variances, and non-waste determinations, *see id.* § 261.4(a)(1)). The affirmative and negative definitions, however, are both subject to the statutory principle of “discard.”

If material is *actually* “discarded” despite claims of recycling or reuse, EPA “can regulate” it. *API v. EPA*, 216 F.3d 50, 59 (D.C. Cir. 2000) (“*API II*”). For decades, to prevent such “sham recycling” from escaping RCRA jurisdiction, a non-binding EPA memorandum was the “primary source of guidance . . . in distinguishing between legitimate and sham recycling.” 73 Fed. Reg. at 64,700-01 (discussing EPA Office of Solid Waste and Emergency Response Directive 9441.1989(19)). That memorandum identified non-exclusive, non-dispositive criteria, but left the ultimate legitimacy determination to a case-by-case evaluation of whether “discard” was occurring. Directive 9441.1989(19) at 1, 4-6. In the 2008 rule, EPA modified this approach in part, determining whether certain specific classes of secondary materials were truly “recycled” by considering four codified “legitimacy factors,” two of which were not mandatory. *See* 73 Fed. Reg. at 64,743-44, 64,759.

II. The 2015 Rule Expanded The Definition Of “Solid Waste” To Subject All “Hazardous Secondary Materials,” Whether Or Not “Discarded,” To Regulatory Duties.

The 2015 rule significantly expanded EPA’s definition of “solid waste” in three main ways. First, EPA declared that any “hazardous secondary material[s]” that are “sham recycled” are deemed “discarded and a solid waste.” 80 Fed. Reg.

at 1774 (codified at 40 C.F.R. § 261.2(b)(4), (g)).¹ Second, EPA defined “sham recycling” as any recycling that is not “legitimate.” *Id.* (codified at § 261.2(g)). Third, EPA defined “legitimate recycling” by imposing four new “legitimacy” factors, and making them mandatory for *all* recycling—including for regulatory exclusions EPA adopted in pre-2008 rulemakings, and other materials not previously subject to *any* codified legitimacy factors. *Id.* at 1773 (codified at § 260.43).

Together, these changes (1) extend the “legitimacy” factors to govern *all recycling* of “hazardous secondary materials,” and (2) through now-mandatory factors nominally defining “solid waste,” actually impose substantive regulatory duties and obligations (e.g., assessments, labeling, documentation, and storage requirements) regardless of whether materials are “discarded.”

Under the first and second legitimacy factors, legitimate recycling must “involve a hazardous secondary material that provides a useful contribution to the recycling process or to a product or intermediate of the recycling process,” and “produce a valuable product or intermediate.” 40 C.F.R. § 260.43(a)(1)-(2) .

Under the third legitimacy factor, those handling secondary material “must manage [it] as a valuable commodity.” *Id.* § 260.43(a)(3). If an “analogous raw

¹ “Hazardous secondary material means a secondary material (e.g., spent material, by-product, or sludge) that, when discarded, would be identified as hazardous waste.” 40 C.F.R. § 260.10.

material” exists, the secondary material must be managed “in a manner consistent with the management of the raw material or in an equally protective manner.” *Id.* If no analogous raw material exists, the secondary material “must be contained,” *id.*—i.e., “held in a unit (including a land-based unit)” that is “in good condition, with no leaks or other continuing or intermittent unpermitted releases,” and “designed . . . to prevent [such] release[s],” *id.* § 260.10. The unit also must be “properly labeled” or logged in a system. *Id.*

Under the fourth legitimacy factor, the “product of the recycling process” must be “comparable to a legitimate product or intermediate,” in one of three ways. *Id.* § 260.43(a)(4). *One:* If “there is an analogous product or intermediate,” (1) the product of recycling cannot “exhibit a hazardous characteristic . . . that analogous products do not exhibit,” and (2) every hazardous constituent in the product of recycling or intermediates must be “at levels that are comparable to or lower than those found in analogous products or at levels that meet [any] widely-recognized commodity standards and specifications” that specifically address each constituent. *Id.* § 260.43(a)(4)(i).² *Two:* If there is *no* “analogous product” (*e.g.*, where a product is unique, innovative, or proprietary), (1) the product of recycling must be “a commodity that meets widely recognized commodity standards and

² EPA has identified some 400 such hazardous constituents. 40 C.F.R. pt. 261, App. VII.

specifications,” or (2) the “hazardous secondary materials being recycled” must be “returned to the original process or processes from which they were generated to be reused.” *Id.* § 260.43(a)(4)(ii). *Three:* If the product does not satisfy either of those approaches, it “*may*” satisfy the fourth factor if the recycler prepares an environmental and health risk assessment, documentation, and a “certification statement” showing why the recycling is legitimate, and notifies EPA. *Id.* § 260.43(a)(4)(iii) (emphasis added). However, the only consequence of following those steps is that the recycling “*may*” or “*can be shown*” to be legitimate—from the after-the-fact perspective of an agency decisionmaker. *Id.* (emphasis added). The 2015 rule also requires ongoing documentation of how materials satisfy the legitimacy factors. *See* 80 Fed. Reg. at 1755-56.³

Additionally, in responding to comments, EPA departed from its historical position by interpreting the term “secondary materials” to include off-specification products used in their normal manner (or processed for such use).

³ After issuing the 2015 rule, EPA published a “Frequent Questions” document. *See* EPA, *2015 Definition of Solid Waste Final Rule Frequent Questions* (Mar. 31, 2015), https://www.epa.gov/sites/production/files/2015-08/documents/expanded_faq_033115.pdf (“*Frequent Questions*”), JA 1162-72. The document states that it is “for public information purposes only” and “does not substitute for the actual laws and regulations.”

III. The 2015 Rule Replaced The 2008 Rule’s “Transfer-Based” Exclusion With A “Verified Recycler” Exclusion.

Under the 2008 rule’s “transfer-based” exclusion, certain secondary materials transferred to third parties for reclamation were not deemed “solid waste” if several conditions were satisfied. For example, generators had to undertake “reasonable efforts” to ensure that the reclaimer would legitimately and safely recycle the material. 40 C.F.R. § 261.4(a)(24)(v)(B) (2014). The reclaimer had to “contain[]” the material and “manage [it] in a manner that is at least as protective as that employed for analogous raw material.” *Id.* § 261.4(a)(24)(vi)(D).

The 2015 rule replaced this exclusion with a “verified recycler exclusion,” under which hazardous secondary materials must be sent for reclamation “to a verified reclamation facility.” *Id.* § 261.4(a)(24)(v)(B) (2015). Among other requirements, such a facility must either have a RCRA subtitle C hazardous waste management permit, or go through an alternative pre-approval process to obtain a variance. *Id.* §§ 260.31(d), 261.4(a)(24)(v)(B).

The 2008 rule’s transfer-based exclusion was not available for petroleum refinery hydroprocessing catalysts that are regenerated or sent to reclaimers for recovery of valuable metals. *Id.* §§ 261.2(a)(2)(ii), 261.4(a)(23)(iv), 261.4(a)(24)(iii). Both the Sierra Club and API challenged the 2008 rule in this Court. *See Sierra Club v. EPA*, No. 09-1041; *API v. EPA*, No. 09-1038. In

response to Sierra Club's suit, EPA agreed to revisit the 2008 rule. *See* Settlement Agreement filed in No. 09-1041 (Sept. 10, 2010) [Doc. #1265157]. In 2012, this Court concluded that EPA's then-pending rulemaking rendered API's challenge unripe, and held it in abeyance. *API III*, 683 F.3d at 384.

The 2015 rule makes refinery catalysts eligible for exclusion on the same terms as other secondary materials. API's abated challenge to EPA's asserted authority over catalysts has now been reinstated and consolidated with petitions challenging the 2015 rule, having become—with the repeal of the transfer-based exclusion and as this Court predicted, “concrete and straightforward.” *Id.* at 388.

IV. The Primary Metals Sector, Like Many Others, Involves The Productive Use And Reuse Of Secondary Materials To Which RCRA Was Never Intended to Apply.

Many sectors of the U.S. economy, from chemical and industrial manufacturing to resource extraction, depend on the productive use and reuse of secondary materials—from reused chemical solvents to catalysts and partly-refined metals—to which RCRA was never intended to apply. In particular, many of this Court's prior decisions enforcing statutory limits on RCRA jurisdiction involve the mining and primary metals industries. These industries exemplify principles and processes of reuse and recycling that Congress has long sought to encourage. They typically employ continuous, incremental, and ongoing methods to transform low-value, naturally occurring raw materials into highly refined commodities. During

these often-extended production processes, low-concentration minerals are extracted from raw materials, and in-process intermediates are carefully managed to ensure that target metals are recovered, refined, and eventually put to productive use.

Petitioner Freeport-McMoRan Inc. (“Freeport”), for instance, extracts, concentrates, and processes naturally-occurring copper and molybdenum ores to produce pure metals and other valuable products, such as copper cathode, copper rod, molybdenum trioxide, and rhenium metal. *See* Freeport-McMoRan Copper & Gold Inc. Comments 3, EPA-HQ-RCRA-2010-0742-0363 (Oct. 20, 2011) (“2011 Freeport Comments”), JA 889; Phelps Dodge Corporation Comments 10-15, EPA-RCRA-2002-0031-0087 (Feb. 24, 2004) (“2004 Freeport Comments”), JA 421-26.

As is typical in the primary metals industry, Freeport’s products cannot be created from ores in one step. *See* 2011 Freeport Comments 3, JA 889; *accord American Mining*, 824 F.2d at 1181 (“Rome was not built in a day, and all metal cannot be extracted in one fell swoop”). Naturally-occurring ores contain target minerals in very low concentrations (e.g., 0.1%), typically bound in a complex mineral matrix (e.g., copper or molybdenum sulfide). Ores are physically crushed and separated into “concentrates,” enriched (e.g., 30%) in the desired minerals. Concentrates are the main feedstock for production methods such as smelting and

refining, which purify and recover solid metals and other products from the mineral matrix.

These methods create numerous valuable in-process materials and intermediates with much higher target-metal levels than raw ores. Freeport maximizes its recovery and reprocessing of these materials. Freeport also recovers other valuable substances, such as sulfur compounds used to create sulfuric acid, and precious metals such as silver and gold. *See* 2011 Freeport Comments 3, JA 889.

Some in-process materials and intermediates are also important operationally. For example, Freeport's copper smelter in Miami, Arizona, uses cooled chunks of partially refined copper metal (so-called "revert") to moderate the temperature of molten copper. *See* 2011 Freeport Comments 18, JA 893. Similarly, a weak sulfuric acid solution is used to produce copper through hydrometallurgy. *See id.* at 31, JA 900.

At the Miami facility, Freeport processes, reprocesses, or produces dozens of in-process materials and products potentially subject to regulation under the 2015 rule. Freeport-McMoRan Inc., *Impacts of EPA's 'Solid Waste' Rule on Primary Mineral Processing & Recycling* 14-15 (Dec. 5, 2013) ("Freeport Presentation"), EPA-HQ-RCRA-2010-0742-0379, JA 915-16. The practical consequences would be severe: under RCRA, hazardous wastes cannot be generated, transported,

treated, stored, or disposed of except in compliance with strict management and permitting requirements. If EPA asserts RCRA jurisdiction over even one such stream, Freeport could not continue its current production activities without major management, production, permitting, and operational changes. Some production activities might become economically or practically unviable.

SUMMARY OF ARGUMENT

EPA's regulations unlawfully and arbitrarily assert RCRA authority over materials that are not discarded.

First, the 2015 rule's mandatory legitimacy factors exceed EPA's statutory authority because they (1) impose handling, storage, and chemical-composition standards on non-discarded materials; and (2) deem the reuse or recycling of many non-discarded, in-process materials to be "sham recycling" because, *e.g.*, the materials are reused or recycled in a different process than the one that generated them. The 2015 rule also unlawfully applied the legitimacy factors to pre-2008 exclusions without record support, and to used-oil recycling without notice and contrary to statute.

Second, although the verified recycler exclusion purports to define "solid waste" in the context of secondary materials sent to third parties for reclamation, at least two of its conditions bear no reasonable relation to "discard." Instead, those conditions constitute affirmative regulation of materials (including petroleum

refinery catalysts) that are not discarded—thus effectively rendering the exclusion a “sham” definition of “solid waste.”

Underlying this overreach is EPA’s presumption that all materials sent off-site to third parties for reclamation are discarded. That presumption is invalid because it conflicts with this Court’s holding in *Safe Food* that mere transfer of secondary materials for recycling is not a good indicator of “discard”; because the studies upon which EPA expressly relies do not support the presumption; because EPA declined to engage commenters’ challenges to EPA’s data—even though the record shows EPA believed the commenters had valid concerns; and because EPA’s presumption arbitrarily conflicts with EPA’s historical position that transfer is of little or no relevance. This Court’s unpublished judgment in *Solvay USA Inc. v. EPA*, 608 F. App’x 10 (D.C. Cir. 2015) does not govern the transfer issue in this case.

Third, in responding to comments, EPA asserted RCRA authority over off-specification fuels and other products that are used in a normal manner, or further processed for such use. Thus, manufacturers may be compelled to prove that their products are products. Not only does RCRA forbid this result, EPA’s present position inexplicably conflicts with its historical position dating to 1985.

STANDING

Petitioners comprise several trade associations and Freeport. Because association members and Freeport are the object of the regulations, their Article III standing is self-evident. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). For the same reason, they “fall[] within the class of plaintiffs whom Congress has authorized to sue.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386-88 (2014).

The associations have standing because (1) their members have standing to sue in their own right; (2) the interests they seek to protect are germane to their associational purposes; and (3) neither the claims asserted nor the relief requested requires any individual member’s participation. *See Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002).

API’s standing is further supported by the Declaration of Mark Deese (*see* Addendum 2). To summarize, Phillips 66 Company is injured because its spent catalysts are subject to more stringent (and costly) regulation than petitioners maintain is lawful or justified in the record. Vacating the challenged regulatory requirements would redress that injury. EPA’s assertion of RCRA authority over burning or reclamation of off-specification fuels would cause Phillips 66 Company to incur additional costs to ensure its practices meet the new legitimacy factors. Vacatur of EPA’s assertion of authority would redress this injury.

Freeport's standing is supported by the Declaration of William E. Cobb (*see* Addendum 3). As it explains (§§ 13-39), Freeport: (1) is directly regulated because it must modify its use and management of certain non-discarded, in-process secondary materials to comply with the 2015 rule's mandatory legitimacy factors and document that compliance, (2) is effectively regulated because the challenged rule, *e.g.*, imposes caps on the concentration of certain chemical constituents, and (3) now faces a dramatically increased enforcement risk.

ARGUMENT

I. Standard Of Review

RCRA incorporates the Administrative Procedure Act's standard of review, which requires setting aside agency action that, *inter alia*: is arbitrary, capricious or otherwise unlawful; exceeds statutory jurisdiction; or does not observe procedures required by law. 42 U.S.C. §6976(a) (citing 5 U.S.C. § 706). In determining whether EPA exceeded its statutory jurisdiction, "the court . . . must give effect to the unambiguously expressed intent of Congress," *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984), and set aside agency interpretations that are unreasonable or "arbitrary or capricious in substance," *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53 (2011).

II. EPA Cannot Lawfully Impose The New Mandatory Legitimacy Factors.

A. By Subjecting All “Hazardous Secondary Materials,” Including Material Covered By Pre-2008 RCRA Exclusions, To Mandatory “Legitimacy” Factors, EPA Unlawfully Regulates Non-Discarded Materials.

RCRA unambiguously limits EPA jurisdiction to materials that are “discarded” in the ordinary sense of that term. *See* 42 U.S.C. § 6903(27); *American Mining*, 824 F.2d at 1192-93. Unless and until a material is “disposed of, thrown away, or abandoned,” EPA cannot regulate it or the process using it, under RCRA. *American Mining*, 824 F.2d at 1190.

This Court has consistently held that secondary materials cannot be “discarded” if they are destined for beneficial reuse or recycling, including in an ongoing industrial process, and has repeatedly rejected EPA’s efforts to impose legal conditions and duties on such materials. In *American Mining*, EPA sought to regulate certain “in-process secondary materials” in the petroleum and mining industries. *Id.* at 1181. These materials included ores that were reprocessed in an ongoing refining process, and dusts that were recycled or reused in processes other than the process that created them. *Id.* This Court held that those secondary materials were not “discarded” because “they are destined for beneficial reuse or recycling in a continuous process by the generating industry.” *Id.* at 1186 (emphasis omitted). This Court refused to defer to EPA’s interpretation of RCRA

because “the term ‘discarded’ is neither inherently difficult to define nor [] so intimately tied to knowledge of the industry and the practicalities of regulation that definition requires agency expertise.” *Id.* at 1184 n.7.

This Court again corrected EPA’s overreach in *Association of Battery Recyclers v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000). There, EPA sought to regulate “residual or secondary materials generated in mining and mineral processing operations.” *Id.* at 1050. It classified such materials as “solid waste,” unless they were stored in certain “tanks, containers, buildings, or on properly maintained pads”—regardless of how long materials were stored. *Id.* at 1051. This Court held, as a matter of “clear [statutory] meaning,” that EPA exceeded its jurisdiction because “*at least some* of the secondary material EPA seeks to regulate as solid waste is destined for reuse as part of a continuous industrial process and thus is not abandoned or thrown away.” *Id.* at 1052, 1056 (emphasis added). This Court rejected, and refused to defer to, EPA’s interpretation that secondary materials should presumptively be considered “discarded” unless they are recirculated into a recovery process with “no interdiction in time.” *Id.* at 1052.

This Court has repeatedly affirmed these holdings. *See, e.g., Safe Food*, 350 F.3d at 1268; *API II*, 216 F.3d at 55-56. To be sure, it has granted EPA some deference when applying the term “discarded” in other circumstances, where discard actually appeared to be occurring. *See Battery Recyclers*, 208 F.3d at

1056. For example, this Court sustained EPA's interpretation for materials that are "not part of ongoing industrial processes" and had "become part of the waste disposal problem." *American Mining Cong. v. EPA*, 907 F.2d 1179, 1186 (D.C. Cir. 1990) (wastewater "sludges" stored for potential future recycling); *API v. EPA*, 906 F.2d 729, 741 (D.C. Cir. 1990) ("*API I*") (sludges sent for reclamation "as part of a mandatory waste treatment plan"). But EPA receives no deference when seeking to regulate secondary materials destined for recycling or reuse "as part of a continuous industrial process and thus [] not abandoned or thrown away." *Battery Recyclers*, 208 F.3d at 1054-56.

The 2015 rule violates these principles and precedents in numerous ways.

1. *The Third Legitimacy Factor Exceeds EPA's Statutory Authority By Regulating Materials That Are Not "Discarded."*

Battery Recyclers held that EPA cannot define "solid waste" in a manner that imposes substantive requirements on non-discarded materials. *Id.* at 1052. But the 2015 rule does precisely that.

The third legitimacy factor effectively imposes EPA-crafted standards for handling and storing non-discarded material.⁴ For instance, it provides that recycling hazardous secondary materials with "no analogous raw material" is

⁴ See 2011 Freeport Comments 13 & n.55, JA 890; National Mining Association Comments 5, 13 (Oct. 19, 2011), EPA-HQ-RCRA-2010-0742-0111, JA 586, 592; Freeport Presentation 6, JA 907.

“legitimate” only if the materials are “contained.” 40 C.F.R. § 260.43(a)(3). To avoid being deemed “discarded” and thus “solid waste,” materials must be “held in a unit” meeting EPA’s specifications, including being “in good condition, with no leaks or other . . . releases,” “designed . . . to prevent [such] release[s],” and “properly labeled.” *Id.* § 260.10.

These provisions are impermissible under *Battery Recyclers*, 208 F.3d at 1051. First, they make the “manner of storage” the “dividing line between ‘waste’ and nonwaste,” without any connection to the concept of “discard.” *Id.* Thus, EPA is regulating the handling and storage of “secondary material held for recycling in production,” even though the materials “are obviously” not discarded. *Id.* Indeed, under the third factor, being “contained” is a *condition* of qualifying as not discarded, on an ongoing basis. Second, the 2015 rule makes no distinction based on “[h]ow long the materials are stored” and therefore applies even if the materials are “placed on the ground for only a few minutes before being put back into the production process.” *Id.* EPA thus imposes obligations on how hazardous secondary materials are handled before any recycling activity (legitimate or sham) occurs, regulating materials part of a “continuous industrial process” without reference to whether they are “discarded.” *See id.* at 1056.

2. *The Fourth Legitimacy Factor Unlawfully Regulates, and Deems “Sham Recycled,” Materials That Are Not Discarded*

The fourth legitimacy factor has related defects. In the guise of defining “solid waste,” it prescribes the acceptable chemical composition of products and intermediates involved in production processes—materials even EPA admits are not “discarded.” It does so by allowing recycling to be “legitimate” only if “[t]he product of the recycling process” is “comparable to a legitimate product or intermediate.” 40 C.F.R. § 260.43(a)(4). EPA effectively imposes substantive regulation through a jurisdictional backdoor, dictating the composition of both primary “product[s] of recycling” and “secondary materials” used in their production, and thereby limiting what products or intermediates can enter or exit the recycling process. EPA asserts wide discretion to select a particular “product” or “analogous product,” choose particular chemical constituents for comparison, and deem secondary materials “discarded.”

In particular, the fourth factor exceeds EPA’s statutory authority in at least four ways.

One: Subparagraph (i)(B) allows EPA (or state regulators acting by delegation) to deem recycling activities a “sham” if the “product of the recycling process” has a slightly different chemical composition than an “analogous

product.”⁵ *Id.* § 260.43(a)(4)(i)(B). Similarly, subparagraph (i)(A) allows EPA to deem recycling activities illegitimate if the “product” exhibits a hazardous characteristic not exhibited by an analogous product. *Id.* § 260.43(a)(4)(i)(A). EPA can select the “analogous product” and use a difference in chemical composition (or hazardous characteristic) to deem recycling a “sham”—*e.g.*, if the concentration level of “any” one of 400 potential hazardous constituents is higher than and not “comparable to” the level in the “analogous product.” *Id.*⁶ For instance, if sulfuric acid from a copper smelter contains trace concentrations of constituent “X” (present in naturally occurring ores), and EPA selects a grade of sulfuric acid without X (produced from different raw materials), EPA can declare the smelter’s acid-production to be “sham recycling.” That is so, even though the sulfuric acid is never disposed of, abandoned, or thrown away—but rather used or sold as a valuable commodity. *See id.* § 261.2(b)(4), (g).

Alternatively under subparagraph (i)(B), if “recognized commodity standards and specifications” “specifically address” the “levels” of relevant

⁵ *See, e.g.*, 2011 Freeport Comments at 31-32, JA 900-01; Comments of Society of Chemical Manufacturers & Affiliates at 19-20 (Oct. 20, 2011), EPA-HQ-RCRA-2010-0742-0158, JA 868-69; National Mining Association Comments at 9-10 & n.6, 12-13, 16, JA 588-89, 591-92, 595.

⁶ Even where materials can satisfy subparagraph (i)(B), regulated entities apparently must sample and analyze their products, and analogous products of their competitors, for relevant constituents at the single digit part-per-million range, *see* 80 Fed. Reg. at 1727.

hazardous constituents, *id.* § 260.43(a)(4)(i)(B), the 2015 rule frees EPA to select the most restrictive standard, effectively capping the maximum acceptable level of that constituent.⁷

The fourth factor thus puts industry to an impossible choice: either change production processes to generate hazardous secondary materials with less or none of a particular constituent (if that is even possible), or face full-blown RCRA regulation. And it unlawfully allows EPA to impose de facto ceilings on the chemical composition of not-yet (or not-ever) discarded secondary materials and products of recycling.

Two: Even where there is no “analogous product,” subparagraph (ii)(A) of the fourth factor again allows EPA to deem recycling illegitimate if the “product of the recycling” does not meet “widely recognized commodity standards and specifications.” *Id.* § 260.43(a)(4)(ii). EPA can again impose de facto ceilings on chemical constituents by selecting standards and specifications with slightly different composition and thereby deeming recycling to be illegitimate.

Three: Subparagraph (ii)(B) allows EPA to deem recycling illegitimate if a hazardous secondary material is not “returned to the original process or processes

⁷ In reality, commodity standards are typically framed in terms of target *purity* levels (e.g., 18 karat refers to 75% pure gold), rather than setting levels for *impurities*—particularly not low concentration levels of non-key constituents. Accordingly, the “commodity standard” alternative in subparagraph (i)(B) often is illusory.

from which [it] w[as] generated.” *Id.* §260.43(a)(4)(ii)(B). This requirement is akin to that struck down in *American Mining*, which held that certain mining dusts had not been “discarded,” even though they were recycled “in production processes different from the one from which the dusts were originally emitted.” 824 F.2d at 1181, 1193. Essential to that holding is the principle that secondary materials cannot be deemed “discarded” simply because the generating industry recycles them in a different process. *Battery Recyclers* explained that an “ongoing industrial process” could include reclaiming mineral-bearing dust that was not “returned to the zinc production process” that produced it, but instead used in other “on-site cadmium recovery operations.” 208 F.3d at 1053-54.

But subparagraph (ii)(B) of the fourth legitimacy factor does just that.⁸ If a product of recycling has no “analogous product” and does not meet “widely recognized commodity standards and specifications,” it will now be deemed “discarded” unless the hazardous secondary material is “returned to the original process or processes from which [it] w[as] generated.” 40 C.F.R.

§ 260.43(a)(4)(ii)(B). Effectively, EPA has stated that only “closed loop recycling” (a term which triggers a bevy of regulatory conditions and requirements

⁸ See 2011 Freeport Comments 3, 31, JA 889, 900; Precious Metal Producers Comments 12, 15-16 (Oct. 20, 2011), EPA-HQ-RCRA-2010-0742-0340, JA 884, 885-86; Newmont Mining Corp. Comments 21-22 (Oct. 20, 2011), EPA-HQ-RCRA-2010-0742-0220, JA 833-34; Freeport Presentation 13, JA 914.

associated with “hazardous waste” recycling, *see id.* § 261.4(a)(8)) counts as legitimate. *Id.* That exceeds EPA’s authority. *See American Mining*, 824 F.2d at 1181, 1193.

Four: Even subparagraph (iii) unlawfully dictates the composition of non-discarded materials.⁹ *See* 40 C.F.R. § 260.43(a)(4)(iii). Though presented as an alternate means for companies to “demonstrate” that a particular recycling activity is “legitimate,” it requires recyclers to show a “lack of exposure from toxics in the product,” a “lack of the bioavailability of the toxics,” or lack of “a significant human health or environmental risk.” *Id.* As a practical matter, these requirements regulate the composition and characteristics of deliberately created “products” that are not “discarded,” and thus beyond RCRA jurisdiction.

Worse still, EPA’s criteria for differentiating “legitimate” from “sham” recycling—such as risk to human health—have no relation to whether material is “discarded,” and are therefore unlawful and arbitrary. *See Battery Recyclers*, 208 F.3d at 1051; *cf. Int’l All. of Theatrical & Stage Employees v. NLRB*, 334 F.3d 27, 34-35 (D.C. Cir. 2003) (rejecting agency interpretation that “upsets the statutory balance . . . and leads to irrational results”). The mere fact that a recycling process produces or involves a substance (e.g., a valuable industrial solvent) that is

⁹ *See* 2011 Freeport Comments 25-26, 31, JA 895-96, 900; National Mining Association Comments 14, JA 593.

bioavailable or may affect health or the environment does not mean that—and indeed, has no connection to whether—the substance is “discarded.” For instance, many pharmaceuticals are valuable precisely *because* they are bioavailable and have toxic properties that affect target receptors (e.g., bacteria); the mere fact of bioavailability is not an indicator of “discard.”¹⁰ Finally, any supposed flexibility is ultimately *illusory*, because compliance with subparagraph (iii) means only that material “*may*” or “*can* be shown” to be legitimate—not that it will be presumed or deemed legitimate. 40 C.F.R. § 260.43(a)(4)(iii) (emphases added). An agency cannot reserve such discretion, or offer illusory “relief,” when it lacks jurisdiction to regulate in the first instance.

* * *

The practical effect of these provisions is indistinguishable from direct regulation, because industry is put to the choice of either: (1) changing its production processes to yield secondary materials or “product[s] of . . . recycling” with different chemical composition, while also meeting an array of duties and conditions; or (2) having recycling activity deemed a “sham” and subject to full-blown RCRA regulation—despite the fact that the secondary material is not actually “discarded.”

¹⁰ Under subparagraph(iii) , a pharmaceutical pill produced with recycled hazardous secondary materials (e.g., a recycled solvent) would evidently be deemed “hazardous waste,” but not the same pill produced with virgin materials.

B. The New Legitimacy Factors Unlawfully Assert RCRA Jurisdiction Over Numerous In-Process Materials That Are Not Discarded.

The extent of EPA's jurisdictional overreach is highlighted by considering how the 2015 rule regulates certain in-process secondary materials that cannot be understood (and have never been understood, even by EPA) as "discarded."

1. *Copper Smelters Produce Valuable "Copper Revert" That Is Effectively Regulated, And Could Be Deemed "Hazardous Waste," Under The 2015 Rule.*

a. Smelting copper ore to produce commercial-grade pure copper metal creates "revert"—partly-refined pieces of copper that are fed back ("reverted") into the smelting process. Revert is typically 50-95% pure copper, as compared to the 0.1% copper concentration in ores. *See* Freeport Presentation 13, JA 914. Revert includes metal that has cooled on the inside of ladles, drips, splashes, and spills. At Freeport's facilities, reverts are stored on the ground for cooling, then crushed or otherwise re-sized and fed back into the smelting process.

In 2002, EPA concluded that because reverts "contain copper values several orders of magnitude higher than ore," material that "could be considered 'waste-like' in other industries" is instead a crucial "means of recovering copper." EPA, Warning Letter and Certification of Violation Correction 8 (Apr. 9, 2002) ("Inspection Report"; Exhibit 1 to Freeport Presentation), JA 931.

Revert has significant market value, and Freeport stores, buys, and sells it depending on business needs. *See* Inspection Report 9, JA 932. Revert also serves an important operational role. The Miami smelter cannot operate without cooled, partially-processed copper to moderate smelter furnace temperatures—essentially, “ice cubes” for the exothermic chemical reactions occurring in baths of molten copper. *Id.*, JA 932. Given their commercial and operational value, copper reverts are not “discarded”; rather, in EPA’s words, “they are pieces of copper being used as copper.” *Id.*, JA 932.¹¹

b. Under the 2015 rule, however, it is doubtful whether copper revert could satisfy the legitimacy factors—and even if it does, the rule imposes duties and conditions on its use. Under the third factor, recycling activity is a “sham” unless the secondary material is managed consistent with an “analogous raw material” or, where there is no such analogous raw material, is “contained.” 40 C.F.R. § 260.43(a)(3). The 2015 rule does not define “analogous raw material,” but as a matter of plain meaning, there are no obvious “analogous raw material[s]” to revert—which has a copper concentration orders of magnitude higher than ores. As a result, revert evidently must be “contained.”

¹¹ Freeport’s Miami smelter produced and recycled more than 35 million pounds of copper revert in 2012. The disposal of that revert as “hazardous waste,” rather than use in production, would have lost \$165 million in copper that year—*excluding* the cost of purchasing millions of pounds of replacement copper to cool the furnaces. *See* Freeport Presentation 15, JA 916.

EPA’s definition of “contained” includes “land-based unit[s],” but does not appear to fit with storage of partly-refined copper revert. Under the rule’s text, revert must be stored in a “unit” that prohibits “leaks or other continuing or intermittent unpermitted releases” (including “releases through surface transport by precipitation runoff, releases to soil and groundwater, [and] wind-blown dust”) and the “unit” must be “designed . . . to prevent releases of hazardous secondary materials.” 40 C.F.R. § 260.10. For operational and technical reasons, Freeport handles revert on the ground. Revert is generated at very high temperatures, and must cool before being manipulated, resized, or re-introduced into the smelting process. Large pieces must be crushed or broken, using heavy equipment. Even assuming “containment” units could be built, these temperatures and handling practices would quickly damage them.

Nothing in the rule, however, constrains EPA from asserting that copper revert is not “contained.” Although the *Frequent Questions* document contains favorable discussion of “scrap metal” generally, it provides no assurance—simply stating that metal stored on the ground “*could be* considered ‘contained.’” *Frequent Questions* at 9, JA 1170. Moreover, the document does not “substitute for the actual laws and regulations themselves.” *Id.* at 1 n.1. Even if revert is in a qualifying “unit,” it must still be “labeled” or logged continuously. 40 C.F.R.

§ 260.10. And even if revert satisfies all four legitimacy factors, the Rule requires continuous documentation. *See* 80 Fed. Reg. at 1755-56.

Essentially, EPA has asserted authority to regulate in-process material that is 50-95% pure copper and necessary to ongoing production. *See Battery Recyclers*, 208 F.3d at 1051. Indeed, *Battery Recyclers* explicitly identified copper revert “at [the] Miami smelter” as “[a]n example” of legitimate “reclaiming” of valuable “secondary material.” *Id.* at 1054 n.2; *see also id.* (“The revert inventory is constantly in process of being reused.”). Finally, EPA itself has concluded that reverts “are not solid wastes” because they “are typically used by returning them directly into the ongoing smelting process.” Inspection Report 9, JA 932.

Despite these clear authorities, EPA’s latest rule appears to require Freeport to change its management and use of revert, and to comply with EPA’s new conditions and legal duties to ensure it qualifies as “contained.” EPA lacks authority to mandate such changes, because revert is not “discarded.”

2. *Freeport Also Produces And Uses A Valuable Weak Sulfuric Acid Solution To Produce Copper Through Hydrometallurgy.*

a. At the Miami smelter, gases generated during the smelting process are routed to an “acid plant”—i.e., a facility designed to purify those gases and convert sulfur dioxide into sulfuric acid. *See* 2004 Freeport Comments 12, JA 423. This approach prevents emissions that might otherwise contribute to air pollution, while

generating a valuable commodity—i.e., commercial-grade concentrated sulfuric acid. The acid plant also produces a less-concentrated “weak” acid solution, containing water, sulfuric acid, and copper, as well as other constituents from the naturally occurring ore. *Id.* at 14-15, JA 425-26.¹²

Weak acid is a valuable input for Freeport’s land-based “heap leaching” production facilities. The in-process weak acid extracts the copper metal into liquid solution; the liquid is then collected and copper “electroplated” out of solution, to create pure, solid copper. *E.g.*, 2007 Freeport Comments 7-8, JA 499-500.

In 2002, EPA determined that this production and use of “weak acid” was entirely legitimate under then-applicable (and non-mandatory) guidance. *See* Inspection Report 16-20, JA 939-43. EPA said the “weak acid” substitutes for acid and water that Freeport would otherwise purchase, derives “all of its acid value and toxic metals from the sulfates and metals originally in the furnace [ore] feedstock,” and is used to leach copper, not dispose of the toxic metals present in the solution. *Id.* at 18-20, JA 941-43.

The 2015 rule, however, imposes new conditions and duties on the use of weak acid, and as explained below, appears to deem weak acid a “hazardous

¹² *See* 2011 Freeport Comments 31-32, JA 900-01; Freeport-McMoRan Inc. Comments 7-8 (June 25, 2007), EPA-HQ-RCRA-2002-0031-0528 (“2007 Freeport Comments”), JA 499-500.

waste,” implicating full-blown RCRA regulation. The latter outcome would impose significant operational and financial costs: in 2013, Freeport estimated that disposing of weak acid as “hazardous waste” (instead of re-using it) would involve significant costs: e.g., construction of a \$30 million on-site treatment plant. *See* Freeport Presentation 15, JA 916.

b. By imposing the fourth legitimacy factor on all recycling, including Freeport’s production and use of the in-process weak acid solution, the 2015 rule upsets EPA’s longstanding regulatory regime and exceeds the Agency’s authority.

EPA’s fourth legitimacy factor appears to give EPA wide berth to select sulfuric acid from other sources as the relevant “analogous” product to weak acid. Section 260.43(a)(4) deems recycling activity to be a “sham” if the relevant “product of the recycling” (which EPA apparently could designate as weak sulfuric acid) “exhibit[s] a hazardous characteristic . . . that analogous products do not exhibit,” or has concentrations of hazardous constituents that are not “comparable to or lower than” the “analogous product” or in qualifying “commodity standards.” *Id.*¹³

Because weak acid at Miami derives from raw copper ores, it contains trace constituents (including copper, which itself is later recovered through the heap

¹³ Under § 260.43(a)(4)(i)(B), commodity standards must “include levels that specifically address th[e] [relevant] hazardous constituents.” To Freeport’s knowledge, no such standard exists for its weak sulfuric acid solution.

leach process) that are absent in acids produced from different feedstocks (e.g., raw sulfur). The rule does not appear to prevent EPA from selecting such acids as the relevant “analogous product,” thereby forcing Freeport either to (1) undertake an “assessment” of the weak acid under § 260.43(a)(4)(iii), (2) modify production processes (if possible) to change the weak acid’s composition; or (3) accept full-blown RCRA regulation because its weak acid contains constituents EPA’s “analogous product” does not.

The same is true for the concentrated, commercial-grade sulfuric acid that is a *co-product* of the Miami smelter. While extremely pure, this acid contains trace constituents (e.g., copper) not present in acid from other raw materials. Because sulfuric acid from different feedstocks is often fungible in the marketplace, EPA could select one such acid as the “analogous product,” potentially deeming a smelter’s acid *production* process as illegitimate “sham recycling” because the constituents levels are not “comparable to or lower than” those in EPA’s chosen acid.¹⁴

¹⁴ Similarly, the rule apparently permits EPA to treat pure sulfuric acid and water as the “analogous product,” and weak acid as a “product of the recycling process” that is used as a substitute for pure acid and water in the leaching process. Because Freeport cannot control the chemical composition of naturally occurring ores, weak acid would appear to fail the fourth legitimacy factor under this approach.

EPA's *Frequent Questions* document does not remedy this defect. It addresses only materials "returned to the original production process," such as metal "ores." It is silent about whether weak acid generated during copper smelting qualifies as "returned to the original production process" when used for the heap-leach, not the smelting operation. And by its terms, the document does not bind EPA prospectively.

Even if Freeport developed a regulatory assessment and self-certified that the sulfuric acid "recycling" process is "legitimate" under 40 C.F.R. § 260.43(a)(4)(iii), Freeport would expend time and resources to satisfy those new regulatory obligations. The 2015 rule provides no assurance that such a determination would be sustained. Regulators might disagree with Freeport about whether sulfuric acid satisfies the rule's new standards focused on "exposure," "bioavailability," and the presence of any hypothetical "significant human health or environmental risk." The permissive, ambiguous language ("may be shown," "can be shown," and "significant") gives regulators discretion to reject such determinations and self-certifications, and subject the materials to full-blown RCRA regulation as "hazardous waste." Even if in-process weak acid satisfies all the legitimacy factors, it must still be "labeled" or logged, 40 C.F.R. § 260.10, and Freeport must perform sampling and analysis for comparability determinations, *id.* § 260.43(a)(4)(i)-(ii), and document compliance, 80 Fed. Reg. at 1755-56.

In short, EPA is regulating reverts and weak acid under RCRA, even though they are not “discarded,” but rather are valuable inputs that Freeport would have to replace with other materials. *See* Inspection Report 16-20, JA 939-43. The end result of treating reverts and weak acid as “sham” recycled would be perverse: to avoid potentially crippling RCRA liability, enforcement actions, and citizen suits, *see* 42 U.S.C. § 6972(a), Freeport would likely have to start managing these valuable in-process materials as “hazardous waste,” instead of re-using them. In other words, in attempting to reduce the amount of hazardous waste, EPA has achieved precisely the opposite result, exacerbating the problem Congress sought to solve by enacting the Resource *Conservation* and Recovery Act.

C. The Administrative Record Does Not Support Applying The Legitimacy Factors To All Pre-2008 Exclusions.

Over several decades, EPA adopted numerous regulatory exclusions, each based on exhaustive analysis, record support, and the Agency’s conclusion that certain materials, when recycled in the manner detailed by regulation, should not be regulated as solid waste. *E.g.*, 40 C.F.R. § 261.4(a)(8) (closed-loop reclamation). EPA has not previously made mandatory legitimacy factors a precondition for these exclusions. Moreover, in the 2015 rulemaking, EPA conceded that the current administrative record does not support imposing mandatory conditions on all pre-2008 exclusions. *See* 80 Fed. Reg. at 1741 (“more

information is needed prior to taking final action on specific conditions of the pre-2008 recycling provisions.”); *Frequent Questions* at 4, JA 1165 (record “not adequate” for “across-the-board conditions”). Inexplicably, EPA did exactly that, imposing the codified legitimacy factors on *all* recycling of hazardous secondary materials—including the pre-2008 exclusions. 40 C.F.R. § 260.43. Such “internally inconsistent” reasoning, and the lack of record support, is arbitrary and capricious. *General Chem. Corp. v. United States*, 817 F.2d 844, 846 (D.C. Cir. 1987).

D. EPA Applied The Legitimacy Factors To Used-Oil Recycling Without Notice Or Opportunity For Comment And Contrary To Statutory Authority.

The 2015 rule applies the legitimacy factors to the recycling of *all* hazardous secondary materials, including used oil. *See* 40 C.F.R. § 260.43. But the 2011 proposed rule listed only a specific group of 32 hazardous waste exemptions, to which the legitimacy factors would apply. *See* 76 Fed. Reg. 44,093, 44,139 (July 22, 2011), JA 249. The list omitted 40 C.F.R. § 261.6(a)(4), applicable to used oil exhibiting a hazardous characteristic but otherwise regulated under 40 C.F.R. part 279. The 2011 proposed rule therefore did not provide notice or opportunity to comment on whether the legitimacy factors should apply to recycling that subset of used oil. This procedural defect was prejudicial, and requires vacating EPA’s application of the legitimacy factors to this subset of used-oil recycling.

The 2015 rule violates the Used Oil Recycling Act, which directs EPA to ensure that its regulations do not “discourage” used-oil recycling, consistent with the protection of human health and the environment. 42 U.S.C. § 6935(a). Under the 2015 rule, however, recyclers must assess whether used oil is a secondary material and exhibits a hazardous waste characteristic. If so, recyclers must determine whether it meets the legitimacy criteria, including whether the recycled product has hazardous characteristics comparable to a legitimate product or intermediate. These analyses and requirements go beyond the specific requirements for used-oil recycling in 40 C.F.R. § 279.11, and must be performed prior to managing the used oil under the comprehensive standards in 40 C.F.R. part 279. Imposing these additional restrictions on used-oil recycling violates Congress’s directive that EPA “not discourage the recovery or recycling of used oil.” 42 U.S.C. § 6935(a).

III. In The Guise Of Defining “Solid Waste,” The Verified Recycler Exclusion Unlawfully Regulates Materials Transferred For Recycling That Are Not “Discarded.”

A. EPA’s Presumption That Materials Transferred For Recycling Are Discarded Is Contrary To Law And Arbitrary.

Underlying EPA’s assertion of RCRA authority over secondary materials transferred for reclamation (in lieu of disposal)—manifest in the conditions

imposed upon the 2015 verified recycler exclusion—is the broad presumption that such transfers constitute “discard.” In the preamble, EPA found it

reasonable to conclude that transfers of hazardous secondary materials to third-party recyclers generally involve discard except for instances where EPA has evaluated and promulgated a case-specific exclusion that a hazardous secondary material is not a solid waste.

80 Fed. Reg. at 1707. This presumption not only conflicts with this Court’s precedent, but also rests upon speculation, unproved theories, and unanswered challenges from commenters.

1. *EPA’s Presumption Conflicts With This Court’s Precedent.*

In *Safe Food*, this Court held that “firm-to-firm transfers are hardly good indicia of a ‘discard’ as the term is ordinarily understood.” 350 F.3d at 1268. The petitioners there challenged EPA’s conditional exclusion of certain secondary materials that were transferred to third parties for use in producing fertilizer. Petitioners claimed that “as a matter of plain meaning, the materials in question are ‘discarded’ even though they are recycled in a useful product.” *Id.* Petitioners further claimed that this Court’s cases on “solid waste” had held that “material that is transferred to another firm or industry for subsequent recycling must always” be discarded. *Id.*

The Court denied that it had ever held that transferred materials must be considered discarded. *Id.* As for whether transfer equals “discard” as a matter of “plain meaning” (versus a matter of precedent), this Court concluded:

Although ordinary language seems inconsistent with treating immediate reuse within an industry’s ongoing industrial process as a “discard,” . . . *the converse is not true.* . . . [F]irm-to-firm transfers are hardly good indicia of a “discard” as the term is ordinarily understood.

Id. (emphasis added).

This Court’s conclusion that transfer is not a good indicator of “discard” was integral to its decision not to reverse EPA on statutory grounds, as the *Safe Food* petitioners requested. Thus, that conclusion was a holding, which EPA may not ignore. *See Aamer v. Obama*, 742 F.3d 1023, 1035 (D.C. Cir. 2014) (statement that is “integral to our ultimate disposition of the case . . . constitutes binding precedent.”).

It is true that under *API I* and *Safe Food*, EPA may determine that particular secondary materials sent to third-parties have become “part of the waste disposal problem” and thus are “discarded” and “solid wastes.” But under *Safe Food*, EPA may not create a broad presumption that mere transfer equals discard, as it has done here.

2. *EPA's Presumption Rests Upon Speculation, Unproved Theories, And Unanswered Comments.*

Assuming *arguendo* that *Safe Food* would permit EPA to create the broad presumption that transfer equals discard, EPA would need a very strong record to do so. No such record exists here.

a. Problems Study

EPA relies primarily upon two studies. See 80 Fed. Reg. at 1707. The first, entitled *An Assessment of Environmental Problems Associated with Recycling of Hazardous Secondary Materials* (“Problems Study”), went through several iterations, the most recent of which is dated December 10, 2014. EPA-HQ-RCRA-2010-0742-0370, JA 998.

As of the 2014 iteration, the Problems Study identified 250 instances where recycling had caused some form of environmental damage. Problems Study 5, JA 1004. But the study never attempted to address whether this number has any significance.

According to the other study upon which EPA relies, the Problems Study’s “goal” was “to identify and characterize as many cases of environmental damage as possible that have [*sic*] attributed to some type of hazardous material recycling activity and have occurred after 1982.” EPA, *A Study of Potential Effects of Market Forces on the Management of Hazardous Secondary Materials Intended*

for Recycling (“Market Study”) 44 n.12 (2006), EPA-HQ-RCRA-2002-0031-0358, JA 447. So the Problems Study’s goal was not to determine how big a part of the recycling universe any cases of environmental damage involving recycling might be—but simply to find “as many cases of environmental damage as possible.” *Id.*

Commenters observed that the 250 cases did not prove anything in isolation, and urged EPA to place them in perspective. Referring to the 223 cases in an earlier iteration of the Problems Study, API asked “[W]hat percentage of all facilities engaged in recycling during the 25-year period do those . . . cases represent? What percentage, by volume, of total hazardous secondary materials recycled . . . did *not* result in any apparent environmental damage?” API Comments 11 (Oct. 20, 2011), EPA-HQ-RCRA-2010-0742-0175, JA 603.

API pointed out that the 223 identified damage cases EPA identified “would represent just two percent of 10,254 facilities involved in recycling” and thus “it could be said that well over 98 percent of recycling operations do not result in environmental damage.” *Id.* at 12, JA 604. Additionally, API cited statistics from the National Response Center showing that *each year* the Center receives over 30,000 environmental incident reports, the vast majority of which presumably involve raw materials or products. *Id.* at 12-13, JA 604-05. API queried

[I]f EPA believes the potential for causing environmental damage characterizes an activity as involving discard (a premise API disputes), should EPA not test its belief against a complete set of

facts? If management of indisputably *non-discarded* materials (raw materials, products, etc.) has similar potential for causing environmental harm, how can EPA conclude that such potential tends to *define* discard?

Id. at 12, JA 604.

Other commenters raised similar concerns. The Federal Recycling and Remediation Coalition pointed out that a mere 223 damage cases, out of the thousands of facilities transferring material for recycling, did not support EPA's conclusion that "most transfers of hazardous secondary material for recycling do involve discard." Federal Recycling and Remediation Coalition Comments 6 (Oct. 20, 2011), EPA-HQ-RCRA-2010-0742-0255, JA 856. Others observed that "[t]he damage cases demonstrate that only a very small percentage of recycling activities result in environmental harm." American Foundry Society Comments 4 (Oct. 20, 2011), EPA-HQ-RCRA-2010-0742-0246, JA 851.

Moreover, while EPA ultimately condemned third-party, off-site recycling, the Problems Study upon which EPA relies did not reach any conclusion about whether such recycling poses greater environmental risks than generator-controlled recycling. The study noted that 92 percent of the damage cases involved off-site recycling—but cautioned that the significance of this was unclear:

The small number of on-site recycling damage cases may indicate that this type of recycling is inherently less environmentally risky than recycling at off-site commercial facilities. *However, it may also be that on-site recycling is simply a less common practice, or that these*

types of damage cases are less well documented, and thus more difficult to identify than cases involving commercial recyclers. In any case, . . . several of the on-site damage cases . . . were apparently among the most expensive cleanup sites that we documented.

Problems Study 8 (emphasis added), JA 1007.

In fact, the Market Study presents data suggesting that the vast majority (75 percent) of recycled secondary materials *are* recycled *off-site*, Market Study 14, JA 431, which would confirm that “on-site recycling is simply a less common practice,” Problems Study 8, JA 1007. Additionally, yet another EPA analysis concluded—at least qualitatively—that “[t]he hazards for off-site recycling facilities are generally the same as those for on-site recycling processes.” 1 EPA, *Potential Adverse Impacts Under the Definition of Solid Waste Exclusions* 28 (2014), EPA-HQ-RCRA-2010-0742-0371(2), JA 1084.

Thus, on the current record, EPA does not know whether recycling is a particularly risky activity—much less whether off-site or on-site recycling is substantially riskier. EPA’s presumption that transfer equals “discard” is based upon speculation, and therefore arbitrary and capricious.

Moreover, EPA did not provide a reasoned response to commenters’ concerns about the data. EPA apparently thought the commenters had a good point, but dodged it by treating the comments as limited to questioning EPA’s proposal to add conditions to the pre-2008 exclusions:

Regarding other comments . . . including comments . . . on comparing the number of damage cases to the total number of affected entities, EPA agrees with commenters that more information is needed prior to taking final action on specific conditions of the pre-2008 recycling provisions.

80 Fed. Reg. at 1741.

But the comments were not so limited. *See* API Comments 2, 12-13, JA 601, 604-05; Federal Recycling and Remediation Coalition Comments 6, JA 856; American Foundry Society Comments 1, 3-5, JA 849, 850-52. The Agency's failure to respond cogently to the commenters' concerns about a central aspect of the proposal was arbitrary and capricious. *Delaware Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 13-14 (D.C. Cir. 2015).

Because EPA's reliance upon the Problems Study was arbitrary and capricious, the Court must set aside EPA's presumption that transfer equals discard. 5 U.S.C. § 706(2)(A). While EPA also relied upon the Market Study (discussed below), it is not clear from the record that EPA would have reached the same conclusion without the Problems Study. Accordingly, the Court may not uphold EPA on the basis of the Market Study alone:

“[W]hen an agency relies on multiple grounds for its decision, some of which are invalid,” we may only “sustain the decision [where] one is valid and the agency would clearly have acted on that ground even if the other were unavailable.”

Williams Gas Processing-Gulf Coast Co., L.P. v. FERC, 475 F.3d 319, 330 (D.C. Cir. 2006) (quoting *Casino Airlines, Inc. v. NTSB*, 439 F.3d 715, 717-18 (D.C. Cir. 2006)).

Nonetheless, as shown below, EPA's reliance upon the Market Study was itself arbitrary and capricious.

b. Market Study

EPA says the Market Study “supports the conclusion that the *pattern of discard* at off-site third-party reclaimers is a result of inherent differences between commercial recycling and normal manufacturing.” 80 Fed. Reg. at 1707 (emphasis added). As shown above, EPA has no basis to find any such “pattern of discard.”

Moreover—although EPA does not announce it—the Market Study was purely theoretical, and did not apply broadly to third-party recycling. First, the study disclaims any empirical support:

In order to provide further information and support of the ideas expressed in this theoretical analysis, we conducted an in-depth empirical analysis of five selected, commonly recycled hazardous wastes. The original goal of the empirical analysis was to test the various hypotheses that are presented in the theoretical analysis. *However, limitations on the availability and quality of data prevented us from conducting these empirical tests.*

Market Study 43 (emphasis added), JA 446. The study makes a similar disclaimer with specific reference to so-called “market failure”:

In addition to those characteristics of firms and recycling markets that would be potentially observable, this paper also discussed kinds of market failure that could contribute to sub-optimal hazardous waste recycling outcomes. *While the sources of market failure discussed in the paper are important, they do not necessarily correlate directly to observable characteristics of the firm or market.*

Id. at 48 (emphasis added), JA 448.

Appendix II to the study is entitled “Empirical Analysis.” Notwithstanding the title, the text discloses that “[d]ue to data limitations, this section does not present any empirical tests of the hypotheses laid out in the theoretical section.”

Id. at 54, JA 449.

Appendix II does provide some background and statistics for five “hazardous wastes” that are often recycled—just nothing that would validate the study’s hypotheses.¹⁵ It also cautions that “[t]he selected five materials are not necessarily representative of all hazardous wastes.” *Id.*, JA 449. Then, although the study’s “conclusions” are all purely theoretical anyway, the appendix adds that “the conclusions reached in this paper are not necessarily valid for hazardous wastes, industries and markets other than those analyzed here.” *Id.*, JA 449.

Thus, again, EPA’s conclusion that transfer equals discard rests upon speculation or untested theory. Moreover, in applying the “conclusions” of the Market Study to recycling generally—even though the study says such

¹⁵ The five “hazardous wastes” or secondary materials were lead-acid batteries, brass dust, spent pickle liquor, spent solvents, and used drums.

generalization would not be valid—EPA’s conclusion conflicts with the record.

For these reasons, EPA’s conclusion is arbitrary and capricious.

3. *EPA’s Presumption Arbitrarily Conflicts With EPA’s Historical Position That Transfer Is Irrelevant.*

Historically, whether a secondary material is recycled on-site by the generator or transferred to a third-party has been of little, if any, importance in EPA’s definition of “solid waste.” “EPA’s presumption of discard [thus] conflicts with EPA’s historical approach, dating to 1983.” API Comments 20, JA 609.

In seeking to justify repealing the 2008 transfer-based exclusion, EPA said

EPA has developed many . . . conditional exclusions (found in 40 CFR 261.4(a)). In each of these cases, EPA did so by examining the specific hazardous secondary material or the specific recycling practice, or both, before making a determination that the hazardous secondary material is not solid waste. However . . . the 2008 transfer-based exclusion . . . did not focus on the chemical or physical properties of any particular type of hazardous secondary material or on how it is typically managed.

80 Fed. Reg. at 1708.

While this explanation may have superficial appeal, it does not bear scrutiny for two reasons. First, it begged the question of the significance of transfer, because even though EPA asserted that it examined the specifics of each material under previous exclusions, EPA pointed to nothing showing that the issue of transfer had been of particular relevance.

Second, EPA's explanation failed to address major aspects of the historical regulatory definition of "solid waste." It ignored the longstanding provisions that *all* non-listed sludges, *all* non-listed by-products, and *all* commercial chemical products being reclaimed are excluded from EPA's definition of "solid waste." *See* 40 C.F.R. § 261.2(c)(3) and Table 1 (2014).¹⁶ Whether reclamation occurs on-site or off-site has never been relevant to these broad provisions, and EPA certainly did not specially study each material and or reclamation practice covered by these provisions.

Indeed, in promulgating the core of its definition of "solid waste" in 1985, EPA identified only two relevant factors:

The Agency again emphasizes that to determine if a secondary material is a RCRA solid waste when recycled, one must examine both the material and the recycling activity involved.

50 Fed. Reg. 614, 619 (Jan. 4, 1985). EPA said nothing to suggest the *location* of recycling was important or even relevant.

Thus, EPA's current presumption that transfer equals discard conflicts with EPA's historical position that transfer is of little or no importance to the "discard" inquiry. Commenters challenged EPA on this very point, *see, e.g.*, API Comments 20, JA 609, but EPA failed to provide a reasoned explanation for the conflict.

¹⁶ As shown in section IV, below, commercial chemical products historically have not even been considered "secondary materials" when reclaimed, unless used contrary to their normal manner.

Accordingly, EPA's adoption of its current presumption was arbitrary and capricious. *Williams Gas Processing*, 475 F.3d at 326-27. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) ("an agency changing its course must supply a reasoned analysis.").

4. *Solvay Does Not Govern Here.*

On June 3, 2015, a panel of this Court issued an unpublished judgment in *Solvay USA Inc. v. EPA*, 608 F. App'x 10 (D.C. Cir. 2015). That case involved an EPA rule providing procedures for classifying *non-hazardous* secondary materials as "solid wastes" for purposes of Clean Air Act regulation.

Citing *American Chemistry Council v. EPA*, 337 F.3d 1060, 1066 (D.C. Cir. 2003), the panel said, "[U]nder RCRA, Congress wanted EPA 'to err on the side of caution.'" *Solvay*, 608 F. App'x at *13. Further, it said

EPA is well within its statutory authority to assume that transferred material is solid waste until an interested party demonstrates that the material "has not been discarded and is indistinguishable in all relevant aspects from a fuel product."

Id. For several reasons, *Solvay* does not govern here.

First, *Solvay* is unpublished, meaning that the panel saw "no precedential value" in the decision. Circuit Rule 36(e)(2). It therefore should not be accorded such value here.

Second, *Solvay* involved a different rule and administrative record, and is otherwise distinguishable. *Solvay* dealt with non-hazardous secondary materials, whereas the present rule involves hazardous secondary materials. *Solvay* dealt with transfer of materials to be combusted as fuels, whereas the verified recycler exclusion here does not apply to materials so combusted. The rule in *Solvay* identified materials that when combusted would be considered wastes, subjecting resulting emissions to a specific Clean Air Act section – whereas the present rule governs regulation under Subtitle C of RCRA. Moreover, *Solvay* addressed only the Agency’s purported authority to establish a presumption, not the bald speculation upon which EPA based its presumption here.

Third, to the extent *Solvay* may be read to say that RCRA allows the presumption that transfer equals discard, petitioners respectfully submit that the *Solvay* panel erred. The panel’s reliance upon *American Chemistry Council* was misplaced. That case dealt with EPA’s authority to consider mixtures and derivatives of listed hazardous waste as retaining their status as hazardous wastes. 337 F.3d at 1062. There was no issue of what makes a material “discarded,” and therefore, a “solid waste.”

Well before *Solvay* and *American Chemistry Council*, it was the law of the Circuit that the term “solid waste” restricts EPA’s regulatory authority under RCRA. *American Mining* rested, in part, on the proposition that “[t]he very care

evidenced by Congress in defining RCRA's scope certainly suggests that Congress was concerned about delineating and thus *cabining* EPA's jurisdictional reach." 824 F.2d at 1189 (emphasis added).

In later cases, the Court applied *American Mining* and made clear that EPA bears the burden to establish that a material is "discarded"—if EPA intends to exercise jurisdiction. Occasionally, EPA acknowledges this: "[T]he D.C. Circuit . . . has been very clear that EPA needs to show that materials are discarded to consider them solid wastes." EPA 2014 Response To Comments 14, EPA-HQ-RCRA-2010-0742-0372, JA 1091.

API II vacated EPA's refusal to exclude in-process oil-bearing refinery wastewaters from the definition of "solid waste," adding that on remand EPA must provide a reasoned explanation of when discard occurs "if EPA wishes to assert jurisdiction." 216 F.3d at 58. Similarly, in *Battery Recyclers*, the Court set aside the regulation of certain mineral processing materials, because "at least some" of the material was not abandoned or thrown away. 208 F.3d at 1056, 1060.

These prior decisions are incompatible with *Solvay's* finding that EPA may "assume" that transferred material is "solid waste" and place the burden upon regulated entities to show their materials should not be regulated. Accordingly, *Solvay* cannot be given effect: "One three-judge panel . . . does not have the

authority to overrule another three-judge panel of the court.” *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996).

Petitioners submit that Congress had a very good reason for “cabining” EPA’s RCRA authority. Congress wanted to encourage recycling of materials that would otherwise be “needlessly buried” in landfills. *See* 42 U.S.C. § 6901(c). Accordingly, Congress did not want EPA to impose regulatory burdens upon materials *solely* because of their residual nature, but only where they were part of the waste *disposal* problem. The relevant 1976 committee report explained that

Waste itself is a misleading word Much industrial and agricultural waste is reclaimed or put to new use and is therefore *not a part of the discarded materials disposal problem the committee addresses*.

H.R. Rep. No. 1491, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6240 (emphasis added). *See American Mining*, 824 F.2d at 1192 (legislative history “refers time and again to the problem motivating the enactment of RCRA as the *disposal* of waste.”).

B. In Determining Which Materials Transferred For Reclamation Are “Solid Wastes,” EPA May Not Impose Regulatory Requirements Upon Materials That Are Not Discarded.

As shown above, EPA’s broad presumption that secondary materials transferred for reclamation are “discarded” is both contrary to law and unsupported

by the record. Thus, EPA may not simply impose whatever requirements it deems appropriate upon such materials.

This Court has made clear that while transfer of secondary materials is not by itself a good indicator of “‘discard’ as the term is ordinarily understood,” *Safe Food*, 350 F.3d at 1268, specific types of transferred materials may be considered “solid wastes” if they “can reasonably be considered part of the waste disposal problem,” *id.* See *API I*, 906 F.2d at 740-41. However, in replacing the transfer-based exclusion with the verified recycler exclusion, EPA has gone far beyond defining “discard” (or its absence). Instead, in the guise of defining “solid waste,” EPA has imposed highly specific regulatory requirements upon materials that are not “discarded.”

No matter how carefully a spent material sent to a third party for reclamation is managed, no matter how valuable the material or its products are, no matter how long the recycling practice has existed—the 2015 rule deems it “discarded,” unless the third party either has a RCRA hazardous waste management permit, or has gone through another process of prior government approval for a variance—essentially another permitting process. 80 Fed. Reg. at 1772, 1774, 1775-76 (codified at 40 C.F.R. §§ 260.31(d), 261.2(c)(3) and Table 1, 261.4(a)(24)(v)(B)).

Moreover, the standard for obtaining a variance as a “verified reclamation facility” is vague. The applicant must “*address* the risk . . . to proximate

populations from unpermitted releases” and “must include *consideration* of potential cumulative risks from other nearby potential stressors.” 80 Fed. Reg. at 1772 (emphasis added) (codified at 40 C.F.R. § 260.31(d)(6)).

What level of “risk” (if any) will prove acceptable to the Agency is unknowable in advance. In the preamble, EPA said that “[t]he steps the petitioner would take to address this criterion would depend on case-specific circumstances,” and that “EPA recommends that the petitioner engage the potentially affected community . . . to ensure that they have addressed the concerns expressed by the community.” 80 Fed. Reg. at 1715.

This is *not* a definition of “discard” or its absence. It is a regulatory mandate and an open-ended permitting process. And EPA has imposed it upon materials that EPA has arbitrarily *presumed* are “discarded” merely because they are of a residual nature and have been transferred to third parties for reclamation. Indeed, materials that meet all of the conditions of the 2008 transfer-based exclusion—*but that are reclaimed at a facility that lacks prior government approval*—are treated as solid and hazardous wastes, even though they cannot reasonably be considered part of the “waste disposal problem.”

Similarly, the 2015 rule mandates compliance with highly prescriptive emergency response and preparedness requirements. 80 Fed. Reg. at 1772, 1775,

1780-83 (codified at 40 C.F.R. §§ 260.31(d)(4), 261.4(a)(24)(v)(E), 261.400–420).

Again, this is a regulatory mandate posing as a definition of “solid waste.”

In finalizing the 2008 transfer-based exclusion, EPA recognized that the exclusion’s terms adequately served to define the absence of “discard”:

The final rule sets conditions and restrictions that appropriately define when a hazardous secondary material intended for reclamation is being discarded and are appropriate for a wide range of reclamation processes.

EPA 2008 Response To Comments 572, EPA-HQ-RCRA-2002-0031-0604, JA 527. In finalizing the 2015 rule, EPA did not withdraw this finding. In fact, EPA said the transfer-based exclusion’s conditions had been “developed in a reasoned manner,” and cited the 2008 Regulatory Impact Analysis, EPA-HQ-RCRA-2002-0031-0602[1], JA 501-17, which contained an analysis of how those conditions addressed environmental risks. 80 Fed. Reg. 1708 & n.10.

What EPA said was missing from the transfer-based exclusion was “oversight and public participation.” *Id.* at 1708. So, EPA substituted the verified recycler exclusion (with its permitting requirements) for the transfer-based exclusion so that EPA could regulate *non-discarded* materials to *prevent* their possible *future* discard.

The record makes crystal clear that this is what EPA has done. The preamble states:

By adding the condition of requiring the recycler to obtain a solid waste variance or have a RCRA permit, EPA is *addressing the potential for future discard*, while allowing the legitimate recycling activities that are already occurring to continue.

Id. at 1706 (emphasis added). Similarly, EPA conceded the additional conditions of the verified recycler exclusion “will address the *potential for discard happening in the future*.” EPA 2014 Response To Comments 76 (emphasis added), JA 1100.

EPA went even farther, saying the 2015 rule was designed to “protect human health and the environment from *potential* mismanagement of hazardous secondary materials, for example, if such hazardous materials destined for recycling *instead become discarded or otherwise mismanaged*.” Regulatory Impact Analysis ii (2014) (emphasis added), EPA-HQ-RCRA-2010-0742-0369, JA 997.

But RCRA does not provide such authority to EPA. Instead, Congress limited EPA’s authority to materials that are actually “discarded.”

Under EPA’s view, even “primary materials” (such as raw materials or unused products) would logically be subject to RCRA regulation. Primary materials can be hazardous, and also can be mismanaged—as demonstrated by all the incident reports the National Response Center receives. API Comments 12-13, JA 604-05.

Unashamedly, EPA takes this expansive view of its authority, even though it continues to pay lip service to the law of this Circuit. In the EPA 2014 Response

To Comments (at 14), JA 1091, EPA said “the D.C. Circuit, which is the primary court that deals with these issues, has been very clear that EPA needs to show that materials are discarded to consider them solid wastes.”

Indeed, as early as *American Mining*, EPA argued that RCRA should be broadly construed to effectuate its remedial purpose, and EPA must have regulatory authority over materials destined for recycling in order to *prevent* future harm. EPA Br. at 30-31, *American Mining*, 824 F.2d 1177, JA 1148-49. This Court was not persuaded. *See American Mining*, 824 F.2d at 1186 n.11.

In sum, EPA’s repeal of the transfer-based exclusion (which according to EPA sufficed to define the absence of “discard”) and substitution of the verified recycler exclusion (to the extent it contains conditions that operate to regulate non-discarded materials) was arbitrary and capricious, and in excess of EPA’s RCRA authority.

C. EPA’s Continued Assertion Of RCRA Authority Over Recycled Refinery Catalysts Is In Excess Of Statutory Authority And Arbitrary.

Petroleum refinery hydrotreating and hydrorefining catalysts exemplify EPA’s overreach when approaching transferred materials. The catalysts are used in refinery reactors to remove sulfur and nitrogen from various process streams. *See API III*, 683 F.3d at 385. The catalysts are generally composed of nickel, cobalt, and/or molybdenum compounds supported on an alumina matrix. *See id.*

Over time, the catalysts become deactivated and must be replaced. *See id.* Historically, the vast majority of spent catalysts from petroleum refinery hydroprocessing units have been sent to metals extraction facilities or regeneration facilities—not discarded. API Comments 45, JA 616. “Spent catalyst recycling has been practiced in the petroleum refining industry since the 1950’s.” 60 Fed. Reg. 57,747, 57,780 (Nov. 20, 1995).

The metals extraction facilities produce valuable products. API Comments 45, JA 616. “Vanadium extracted from catalysts comes from the crude oil processed at the refineries,” and accounts for a substantial portion of U.S. raw vanadium production. *Id.* The regeneration facilities re-manufacture the catalysts so that they can substitute for virgin catalysts at refineries. *Id.* at 46, JA 617.

The 2008 rule made the catalysts ineligible for the exclusions. 73 Fed. Reg. at 64,714, 64,760, 64,761. The 2011 proposed rulemaking gave API the opportunity to submit evidence supporting the exclusion of the catalysts. *See* API Comments 45-54 and Attachments B-H, J-L, JA 616-25, 630-781.¹⁷

¹⁷ API entered into the administrative record the specific documents that were the subject of API’s Motion For An Order Directing That A Corrected Or Supplemental Index To The Record Be Filed [Doc. #1266272]. Accordingly, the relief requested in API’s motion is no longer necessary.

In the 2015 rule, EPA removed the language disqualifying the catalysts from exclusion. Accordingly, the catalysts are eligible for the exclusions on the same terms as other materials.

However, as discussed above, in imposing a *permitting* requirement and *highly prescriptive* emergency preparedness requirements in the verified recycler exclusion, EPA acted arbitrarily and beyond its statutory authority. EPA effectively pronounced that catalysts meeting all of the conditions of the transfer-based exclusion, the legitimacy factors, and the new definition of “contained” are still “discarded”—unless they are sent to a RCRA permitted facility or a facility that has obtained a permit-like variance subject to unknowable standards. “Discard” status cannot rationally be defined by whether someone has a permit or meets similar requirements.

This is not an incidental overreach. It is plainly in excess of EPA’s authority, as well as arbitrary and capricious, and the Court should set it aside.

IV. EPA Arbitrarily And Unlawfully Asserts RCRA Authority Over Off-Specification Commercial Products Used In Their Normal Manner.

According to 40 C.F.R. § 260.43(a) as proposed in 2011, the legitimacy factors would apply to recycling of “hazardous *secondary materials*.” 76 Fed. Reg. at 44,150 (emphasis added). In the preamble to that 2011 proposal, EPA proposed to apply the legitimacy factors to “[c]ommercial chemical products being

reclaimed.” 76 Fed. Reg. at 44,139 (citing 40 C.F.R. § 261.2 Table 1). But as API pointed out, EPA had never before considered commercial chemical products (including off-specification products) to be “secondary materials,” *except* where—*contrary to their normal manner of use*—they are placed on the land or burned as fuels. API Comments 42-44, JA 613-15.

Under the final 2015 version of 40 C.F.R. § 260.43(a), the legitimacy factors also apply only to recycling of “hazardous *secondary materials*.” 80 Fed. Reg. at 1773 (emphasis added). In adopting the final rule, EPA did not respond to API’s comments, but did, without reasoned explanation and contrary to EPA’s longstanding policy, adopt the position that off-specification commercial chemical products being reclaimed are “secondary materials.” EPA 2014 Response To Comments 314, JA 1146.

EPA’s 1985 definition of “solid waste”—which as relevant here remains in effect—provided that “commercial chemical products listed in 40 C.F.R. § 261.33” are “solid wastes” only when burned for energy recovery or “used in a manner constituting disposal” (*i.e.*, used on the land), and further, only when those uses were contrary to the products’ normal manner of use. *Id.* §§ 261.2(c)(1), (c)(2) & Table 1. Thus, a commercial chemical product such as jet fuel would not be a “solid waste” when burned for energy recovery. *Id.* § 261.2(c)(2)(ii). Also, commercial chemical products being reclaimed (such as an off-specification jet

fuel processed to produce on-specification fuel) were not “solid wastes.” *Id.*

§ 261.2(c)(3) & Table 1.

Under 40 C.F.R. § 261.33, commercial chemical products include products that are “off-specification.” *Id.* § 261.33(b). Also, EPA has long interpreted the definition to operate identically as to commercial chemical products that are *not* listed in section 261.33, but that exhibit a RCRA hazardous characteristic. 50 Fed. Reg. 14,216, 14,219 (Apr. 11, 1985).

The 1985 definition of “solid waste” did not define “secondary materials.” However, the preamble explained that the term includes “*commercial chemical products recycled in ways that differ from their normal use.*” 50 Fed. Reg. at 616 n.4 (emphasis added).

EPA’s implementing guidance confirmed that commercial chemical products were not “secondary materials” unless they were burned or used on the land—contrary to their normal manner of use. In 1986, EPA issued its *Guidance Manual On The RCRA Regulation Of Recycled Hazardous Wastes* (“Guidance Manual”). Exhibit 3 listed “Types Of Secondary Materials Defined As Solid And Hazardous Wastes When Recycled.” The list included “Commercial Chemical Products (both listed and nonlisted/characteristic; *not ordinarily applied to the land or burned as fuels.*” Guidance Manual, Exh. 3 (emphasis added), JA 389.

The Guidance Manual discussed many categories of materials and recycling methods. One of those categories was “Other – Non-Secondary Material.” Guidance Manual 229-58, JA 390-419. One example of a “*non-secondary material*” was “[u]nused propulsion fuel from a torpedo that has been fired and retrieved must be reclaimed before reuse for its original purpose because it has been contaminated with salt water.” *Id.* at 229, JA 390. The manual explained that

The fuel is not a secondary material, but unreacted raw material (an unburned fuel). Because it is not a secondary material, it cannot be a solid waste, and is not subject to RCRA subtitle C regulation.

Id. at 230, JA 391.

In subsequent guidance, EPA repeatedly has concluded that off-specification fuels are not “solid wastes”— even if they are reclaimed—when they are burned for energy recovery.

[C]ommercial chemical products (or off-spec commercial chemical products) that are reclaimed are not solid waste even if the material is used to produce a fuel if that is the materials intended purpose. Thus, this off-spec jet fuel, if used to produce jet fuel, is not a solid waste (i.e., an off-spec fuel is being reclaimed to be used as a fuel—its intended purpose). Although . . . 40 CFR 261.2(c)(2)(ii) . . . only addresses commercial chemical products listed in section 261.33, it is implicit in the . . . rules that the same reasoning applies to commercial chemical products that are not listed.

Letter from D. Barnes (EPA) to J. Haake (McDonnell Douglas) 1-2 (July 31, 1988), RCRA Online No. 11360, JA 1150-51. *See also* Letter from D. Bussard (EPA) to D. Gable (W.Va. Div. of Env'tl. Prot.) 1 (1994), RCRA Online No.

11848, JA 1157 (“off-specification fuels, including gasoline, jet fuel, kerosene, diesel, etc., that exhibit a hazardous characteristic and are burned for energy recovery” are products and not “solid wastes”).

In its 1988 proposed response to *American Mining*, EPA summarized the fuels aspect of its “solid waste” definition:

Current EPA rules state that when hazardous *secondary materials* are used directly as fuels or used to produce fuels, both the hazardous *secondary material* and any fuel produced from these materials are solid wastes, and, if hazardous, hazardous wastes. See 40 CFR 261.2(c)(2).

53 Fed. Reg. 519, 522 (Jan. 8, 1988) (emphasis added). That statement was correct only if off-specification fuels burned as fuel or processed for such use were *not* “secondary materials,” because section 261.2(c)(2)(ii) stated then (as now), “commercial chemical products . . . are not solid wastes if they are themselves fuels.”

EPA has never (at least until now) revoked its policy that off-specification fuels used in their normal manner (even with reclamation) are not “secondary materials.” In the 2008 rule, EPA adopted a regulatory definition of “hazardous secondary material,” which does not mention commercial chemical products:

Hazardous secondary material means a secondary material (e.g., spent material, by-product, or sludge) that, when discarded, would be identified as hazardous waste under part 261 of this chapter.

73 Fed. Reg. at 64,757 (codified at 40 C.F.R. § 260.10). Nothing in that definition changed EPA's longstanding policy that commercial chemical products are not "secondary materials" unless they are used contrary to their normal manner of use. *See* API Comments 43, JA 614.

In the EPA 2014 Response To Comments (at 314), JA 1146, EPA interpreted the term "hazardous secondary material" to include commercial chemical products that are "off-specification or otherwise unable to be sold as a product," implying that the specific, regulatory legitimacy factors of 40 C.F.R. § 260.43 (which apply *only* to recycling of "hazardous secondary materials") apply to such products. EPA did so arbitrarily and without providing a reasoned response to API's comments on the issue. In response to a request to clarify that the term "hazardous secondary material" did *not* include commercial chemical products,¹⁸ EPA simply said

[A] commercial chemical product listed in 40 CFR 261.33 could be considered a hazardous secondary material if it is off-specification or otherwise unable to be sold as a product.

EPA 2014 Response To Comments 313-14, JA 1145-46.

¹⁸ *See* Bryan Cave Comments 5 (Oct. 20, 2011), EPA-HQ-RCRA-2010-0742-0256, JA 862.

EPA did not acknowledge that it was *changing* its interpretation. *See id.*

EPA spoke as though it was addressing the question for the first time and offered a nonsensical justification:

[T]he practical implication of including commercial chemical products listed in 40 CFR 261.33 as hazardous secondary materials is that these materials would be eligible for the generator controlled exclusion and verified recycler exclusions at 40 CFR 261.4(a)(23) and (24).

Id.

EPA did not explain why anyone would ever choose highly conditioned exclusions (such as the generator-controlled and verified recycler exclusions) over the unconditional exclusion for commercial chemical products that are used in a normal manner (or reclaimed before being so used). Nor did EPA explicitly address the implications of its new interpretation for the applicability of the legitimacy factors—which, as discussed above, only apply to “hazardous secondary materials.”

EPA’s failure to respond to API’s comments was arbitrary and capricious.

Delaware Dep’t of Nat. Res. & Env’tl. Control, 785 F.3d at 13-14, 15-17.

Independently, EPA’s reversal of its longstanding interpretation that commercial chemical products are “secondary materials” only when burned or used on the land contrary to their normal manner of use—without providing a reasoned explanation

for doing so—was arbitrary and capricious. *Williams Gas Processing*, 475 F.3d at 326-27.

Moreover, petitioners submit that EPA got it right the first time (*i.e.*, in the 1985 definition of “solid waste”). That is, commercial products (including off-specification products) that are used in their normal manner or further processed for such use, are products. They cannot reasonably be viewed as part of the “waste disposal problem” that Congress addressed in RCRA. EPA cannot require manufacturers to prove that their products are products—via the legitimacy factors or otherwise. EPA’s position to the contrary in the 2015 rule was in excess of statutory authority and should be reversed.

CONCLUSION

For the foregoing reasons, the Court should:

- (1) Vacate EPA’s unlawful assertion of RCRA jurisdiction over hazardous secondary materials and products that are not discarded, consistent with *American Mining and Battery Recyclers*;
- (2) Vacate the legitimacy factors in 40 C.F.R. § 260.43, which:
 - (i) unlawfully assert jurisdiction over material that is not “discarded”; (ii) do not rationally define “discard”; and unlawfully apply to (iii) pre-2008 exclusions and (iv) used-oil recycling.

(3) Vacate EPA's assertion of RCRA authority over those secondary materials (including refinery catalysts) that meet the conditions of the verified recycler exclusion, EXCEPT 40 C.F.R. §§ 260.31(d), 261.4(a)(24)(v)(B) and (E), (vi)(G), and 261.400–.420 (*or, in the alternative*, vacate 40 C.F.R. §§ 260.31(d), 261.4(a)(24)(v)(B) and (E), (vi)(G), and 261.400–.420); and

(4) Vacate EPA's assertion of RCRA authority over commercial chemical products (including off-specification products) that are used in their normal manner or reclaimed for such use.

Date: June 20, 2016

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) and this Court's briefing order of September 4, 2015, because this brief contains 13,968 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

DATED: June 20, 2016

/s/ Jeremy C. Marwell

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 25(c), I hereby certify that I have this 20th day of June 2016, served a copy of the foregoing *Opening Brief of Industry Petitioners*, including the Addenda thereto, on all counsel of record electronically through the Court's CM/ECF system or by U.S. mail, postage prepaid.

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No. 09-1038
(and consolidated cases Nos. 15-1083, 15-1085, 15-1088, 15-1089, and 15-1094)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

AMERICAN PETROLEUM INSTITUTE, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

ON PETITION FOR REVIEW OF FINAL REGULATIONS PROMULGATED
BY THE ENVIRONMENTAL PROTECTION AGENCY

ADDENDUM 1:
PERTINENT STATUTES AND REGULATIONS

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injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	5 U.S.C. 1009(a).	June 11, 1946, ch. 324, § 19(a), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94-574 removed the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	5 U.S.C. 1009(b).	June 11, 1946, ch. 324, § 19(b), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94-574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judi-

cial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, § 19(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, § 19(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	U.S. Code	Revised Statutes and Statutes at Large
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85-791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: "This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title]."

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

Sec.	
801.	Congressional review.
802.	Congressional disapproval procedure.
803.	Special rule on statutory, regulatory, and judicial deadlines.
804.	Definitions.
805.	Judicial review.
806.	Applicability; severability.
807.	Exemption for monetary policy.
808.	Effective date of certain rules.

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

(A) the later of the date occurring 60 days after the date on which—

(i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

(i) on which either House of Congress votes and fails to override the veto of the President; or

(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

- 6972. Citizen suits.
- 6973. Imminent hazard.
- 6974. Petition for regulations; public participation.
- 6975. Separability.
- 6976. Judicial review.
- 6977. Grants or contracts for training projects.
- 6978. Payments.
- 6979. Labor standards.
- 6979a. Transferred.
- 6979b. Law enforcement authority.

SUBCHAPTER VIII—RESEARCH, DEVELOPMENT, DEMONSTRATION, AND INFORMATION

- 6981. Research, demonstration, training, and other activities.
- 6982. Special studies; plans for research, development, and demonstrations.
- 6983. Coordination, collection, and dissemination of information.
- 6984. Full-scale demonstration facilities.
- 6985. Special study and demonstration projects on recovery of useful energy and materials.
- 6986. Grants for resource recovery systems and improved solid waste disposal facilities.
- 6987. Authorization of appropriations.

SUBCHAPTER IX—REGULATION OF UNDERGROUND STORAGE TANKS

- 6991. Definitions and exemptions.
- 6991a. Notification.
- 6991b. Release detection, prevention, and correction regulations.
- 6991c. Approval of State programs.
- 6991d. Inspections, monitoring, testing, and corrective action.
- 6991e. Federal enforcement.
- 6991f. Federal facilities.
- 6991g. State authority.
- 6991h. Study of underground storage tanks.
- 6991i. Operator training.
- 6991j. Use of funds for release prevention and compliance.
- 6991k. Delivery prohibition.
- 6991l. Tanks on tribal lands.
- 6991m. Authorization of appropriations.

SUBCHAPTER X—DEMONSTRATION MEDICAL WASTE TRACKING PROGRAM

- 6992. Scope of demonstration program for medical waste.
- 6992a. Listing of medical wastes.
- 6992b. Tracking of medical waste.
- 6992c. Inspections.
- 6992d. Enforcement.
- 6992e. Federal facilities.
- 6992f. Relationship to State law.
- 6992g. Repealed.
- 6992h. Health impacts report.
- 6992i. General provisions.
- 6992j. Effective date.
- 6992k. Authorization of appropriations.

SUBCHAPTER I—GENERAL PROVISIONS

§ 6901. Congressional findings

(a) Solid waste

The Congress finds with respect to solid waste—

(1) that the continuing technological progress and improvement in methods of manufacture, packaging, and marketing of consumer products has resulted in an ever-mounting increase, and in a change in the characteristics, of the mass material discarded by the purchaser of such products;

(2) that the economic and population growth of our Nation, and the improvements in the

standard of living enjoyed by our population, have required increased industrial production to meet our needs, and have made necessary the demolition of old buildings, the construction of new buildings, and the provision of highways and other avenues of transportation, which, together with related industrial, commercial, and agricultural operations, have resulted in a rising tide of scrap, discarded, and waste materials;

(3) that the continuing concentration of our population in expanding metropolitan and other urban areas has presented these communities with serious financial, management, intergovernmental, and technical problems in the disposal of solid wastes resulting from the industrial, commercial, domestic, and other activities carried on in such areas;

(4) that while the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies, the problems of waste disposal as set forth above have become a matter national in scope and in concern and necessitate Federal action through financial and technical assistance and leadership in the development, demonstration, and application of new and improved methods and processes to reduce the amount of waste and unsalvageable materials and to provide for proper and economical solid waste disposal practices.

(b) Environment and health

The Congress finds with respect to the environment and health, that—

(1) although land is too valuable a national resource to be needlessly polluted by discarded materials, most solid waste is disposed of on land in open dumps and sanitary landfills;

(2) disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment;

(3) as a result of the Clean Air Act [42 U.S.C. 7401 et seq.], the Water Pollution Control Act [33 U.S.C. 1251 et seq.], and other Federal and State laws respecting public health and the environment, greater amounts of solid waste (in the form of sludge and other pollution treatment residues) have been created. Similarly, inadequate and environmentally unsound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health;

(4) open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land;

(5) the placement of inadequate controls on hazardous waste management will result in substantial risks to human health and the environment;

(6) if hazardous waste management is improperly performed in the first instance, corrective action is likely to be expensive, complex, and time consuming;

(7) certain classes of land disposal facilities are not capable of assuring long-term containment of certain hazardous wastes, and to avoid substantial risk to human health and the envi-

ronment, reliance on land disposal should be minimized or eliminated, and land disposal, particularly landfill and surface impoundment, should be the least favored method for managing hazardous wastes; and

(8) alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable solid waste disposal sites within five years unless immediate action is taken.

(c) Materials

The Congress finds with respect to materials, that—

(1) millions of tons of recoverable material which could be used are needlessly buried each year;

(2) methods are available to separate usable materials from solid waste; and

(3) the recovery and conservation of such materials can reduce the dependence of the United States on foreign resources and reduce the deficit in its balance of payments.

(d) Energy

The Congress finds with respect to energy, that—

(1) solid waste represents a potential source of solid fuel, oil, or gas that can be converted into energy;

(2) the need exists to develop alternative energy sources for public and private consumption in order to reduce our dependence on such sources as petroleum products, natural gas, nuclear and hydroelectric generation; and

(3) technology exists to produce usable energy from solid waste.

(Pub. L. 89-272, title II, §1002, as added Pub. L. 94-580, §2, Oct. 21, 1976, 90 Stat. 2796; amended Pub. L. 95-609, §7(a), Nov. 8, 1978, 92 Stat. 3081; Pub. L. 98-616, title I, §101(a), Nov. 8, 1984, 98 Stat. 3224.)

REFERENCES IN TEXT

The Clean Air Act, referred to in subsec. (b)(3), is act July 14, 1955, ch. 360, 69 Stat. 322, as amended, which is classified generally to chapter 85 (§7401 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 7401 of this title and Tables.

The Water Pollution Control Act, referred to in subsec. (b)(3), is act June 30, 1948, ch. 758, as amended generally by Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 816, which is classified generally to chapter 26 (§1251 et seq.) of Title 33, Navigation and Navigable Waters. For complete classification of this Act to the Code, see Short Title note set out under section 1251 of Title 33 and Tables.

CODIFICATION

The statutory system governing the disposal of solid wastes set out in this chapter is found in Pub. L. 89-272, title II, as amended in its entirety and completely revised by section 2 of Pub. L. 94-580, Oct. 21, 1976, 90 Stat. 2795. See Short Title of 1976 Amendment note below.

The act, as set out in this chapter, carries a statutory credit showing the sections as having been added by Pub. L. 94-580, without reference to amendments to the act between its original enactment in 1965 and its complete revision in 1976. The act, as originally enacted in 1965, was classified to section 3251 et seq. of this title. For a recapitulation of the provisions of the act as originally enacted, see notes in chapter 39 (§3251 et seq.) of this title where the act was originally set out.

PRIOR PROVISIONS

Provisions similar to those in this section were contained in section 3251 of this title prior to the general amendment of the Solid Waste Disposal Act by Pub. L. 94-580.

AMENDMENTS

1984—Subsec. (b)(5) to (8). Pub. L. 98-616 added pars. (5) to (7), struck out former par. (5) providing that “hazardous waste presents, in addition to the problems associated with non-hazardous solid waste, special dangers to health and requires a greater degree of regulation than does non-hazardous solid waste; and”, redesignated former par. (6) as (8), and substituted a period for the semicolon at end.

1978—Subsec. (a)(4). Pub. L. 95-609 substituted “solid waste” for “solid-waste”.

SHORT TITLE OF 2005 AMENDMENT

Pub. L. 109-58, title XV, §1521, Aug. 8, 2005, 119 Stat. 1092, provided that: “This subtitle [subtitle B (§§1521-1533) of title XV of Pub. L. 109-58, enacting sections 6991j to 6991m of this title, amending sections 6991 to 6991f, 6991h, and 6991i of this title, and enacting provisions set out as notes under section 6991b of this title] may be cited as the ‘Underground Storage Tank Compliance Act’.”

SHORT TITLE OF 1996 AMENDMENT

Pub. L. 104-119, §1, Mar. 26, 1996, 110 Stat. 830, provided that: “This Act [amending sections 6921, 6924, 6925, 6947, and 6949a of this title and enacting provisions set out as a note under section 6949a of this title] may be cited as the ‘Land Disposal Program Flexibility Act of 1996’.”

SHORT TITLE OF 1992 AMENDMENT

Pub. L. 102-386, title I, §101, Oct. 6, 1992, 106 Stat. 1505, provided that: “This title [enacting sections 6908, 6939c to 6939e, and 6965 of this title, amending sections 6903, 6924, 6927, and 6961 of this title, and enacting provisions set out as notes under sections 6939c and 6961 of this title] may be cited as the ‘Federal Facility Compliance Act of 1992’.”

SHORT TITLE OF 1988 AMENDMENT

Pub. L. 100-582, §1, Nov. 1, 1988, 102 Stat. 2950, provided that: “This Act [enacting sections 6992 to 6992k of this title and section 3063 of Title 18, Crimes and Criminal Procedure, and amending section 6903 of this title] may be cited as the ‘Medical Waste Tracking Act of 1988’.”

SHORT TITLE OF 1984 AMENDMENT

Section 1 of Pub. L. 98-616 provided that: “This Act [enacting sections 6917, 6936 to 6939a, 6949a, 6979a, 6979b, and 6991 to 6991i of this title, amending this section and sections 6902, 6905, 6912, 6915, 6916, 6921 to 6933, 6935, 6941 to 6945, 6948, 6956, 6962, 6972, 6973, 6976, 6982 and 6984 of this title and enacting provisions set out as notes under sections 6905, 6921 and 6926 of this title] may be cited as ‘The Hazardous and Solid Waste Amendments of 1984’.”

SHORT TITLE OF 1980 AMENDMENTS

Pub. L. 96-482, §1, Oct. 21, 1980, 94 Stat. 2334, provided: “This Act [enacting sections 6933, 6934, 6941a, 6955, and 6956 of this title, amending sections 6903, 6905, 6911, 6912, 6916, 6921, 6922, 6924, 6925, 6927 to 6931, 6941 to 6943, 6945, 6946, 6948, 6949, 6952, 6953, 6962, 6963, 6964, 6971, 6973, 6974, 6976, 6979, and 6982 of this title; and enacting and repealing provisions set out as a note under section 6981 of this title] may be cited as the ‘Solid Waste Disposal Act Amendments of 1980’.”

Pub. L. 96-463, §1, Oct. 15, 1980, 94 Stat. 2055, provided: “This Act [enacting sections 6901a, 6914a and 6932 of this title, amending sections 6903, 6943 and 6948 of this title, and enacting provisions set out as notes under

sections 6363 and 6932 of this title] may be cited as the 'Used Oil Recycling Act of 1980'."

SHORT TITLE OF 1976 AMENDMENT

Section 1 of Pub. L. 94-580 provided that: "This Act [enacting this chapter and provisions set out as notes under this section and section 6901 of this title] may be cited as the 'Resource Conservation and Recovery Act of 1976'."

SHORT TITLE

Pub. L. 89-272, title II, §1001, as added by Pub. L. 94-580, §2, Oct. 21, 1976, 90 Stat. 2795, provided that: "This title (hereinafter in this title referred to as 'this Act'), together with the following table of contents, may be cited as the 'Solid Waste Disposal Act'" [table of contents omitted].

FEDERAL COMPLIANCE WITH POLLUTION CONTROL STANDARDS

For provisions relating to the responsibility of the head of each Executive agency for compliance with applicable pollution control standards, see Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of this title.

NATIONAL COMMISSION ON MATERIALS POLICY

Pub. L. 91-512, title II, §§201-206, Oct. 26, 1970, 84 Stat. 1234, known as the "National Materials Policy Act of 1970", provided for the establishment of the National Commission on Materials Policy to make a full investigation and study for the purpose of developing a national materials policy to utilize present resources and technology more efficiently and to anticipate the future materials requirements of the Nation and the world, the Commission to submit to the President and Congress a report on its findings and recommendations no later than June 30, 1973, ninety days after the submission of which it should cease to exist.

§ 6901a. Congressional findings: used oil recycling

The Congress finds and declares that—

- (1) used oil is a valuable source of increasingly scarce energy and materials;
- (2) technology exists to re-refine, reprocess, reclaim, and otherwise recycle used oil;
- (3) used oil constitutes a threat to public health and the environment when reused or disposed of improperly; and

that, therefore, it is in the national interest to recycle used oil in a manner which does not constitute a threat to public health and the environment and which conserves energy and materials.

(Pub. L. 96-463, §2, Oct. 15, 1980, 94 Stat. 2055.)

CODIFICATION

Section was enacted as part of the Used Oil Recycling Act of 1980, and not as part of the Solid Waste Disposal Act which comprises this chapter.

§ 6902. Objectives and national policy

(a) Objectives

The objectives of this chapter are to promote the protection of health and the environment and to conserve valuable material and energy resources by—

- (1) providing technical and financial assistance to State and local governments and interstate agencies for the development of solid waste management plans (including resource recovery and resource conservation

systems) which will promote improved solid waste management techniques (including more effective organizational arrangements), new and improved methods of collection, separation, and recovery of solid waste, and the environmentally safe disposal of nonrecoverable residues;

- (2) providing training grants in occupations involving the design, operation, and maintenance of solid waste disposal systems;

- (3) prohibiting future open dumping on the land and requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health;

- (4) assuring that hazardous waste management practices are conducted in a manner which protects human health and the environment;

- (5) requiring that hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date;

- (6) minimizing the generation of hazardous waste and the land disposal of hazardous waste by encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment;

- (7) establishing a viable Federal-State partnership to carry out the purposes of this chapter and insuring that the Administrator will, in carrying out the provisions of subchapter III of this chapter, give a high priority to assisting and cooperating with States in obtaining full authorization of State programs under subchapter III of this chapter;

- (8) providing for the promulgation of guidelines for solid waste collection, transport, separation, recovery, and disposal practices and systems;

- (9) promoting a national research and development program for improved solid waste management and resource conservation techniques, more effective organizational arrangements, and new and improved methods of collection, separation, and recovery, and recycling of solid wastes and environmentally safe disposal of nonrecoverable residues;

- (10) promoting the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of air, water, and land resources; and

- (11) establishing a cooperative effort among the Federal, State, and local governments and private enterprise in order to recover valuable materials and energy from solid waste.

(b) National policy

The Congress hereby declares it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.

(Pub. L. 89-272, title II, §1003, as added Pub. L. 94-580, §2, Oct. 21, 1976, 90 Stat. 2798; amended Pub. L. 98-616, title I, §101(b), Nov. 8, 1984, 98 Stat. 3224.)

PRIOR PROVISIONS

Provisions similar to those in this section were contained in section 3361 of this title, prior to the general amendment of the Solid Waste Disposal Act by Pub. L. 94-380.

AMENDMENTS

1984—Subsec. (a), Pub. L. 98-616, §101(b)(1), designated existing provisions as subsec. (a).

Subsec. (a)(4) to (11), Pub. L. 98-616, §101(b)(2), struck out par. (4) which provided for regulating the treatment, storage, transportation, and disposal of hazardous wastes which have adverse effects on health and the environment, added pars. (4) to (7), and redesignated former pars. (5) to (8) as (8) to (11), respectively.

Subsec. (b), Pub. L. 98-616, §101(b)(1), added subsec. (b).

§ 6903. Definitions

As used in this chapter:

(1) The term "Administrator" means the Administrator of the Environmental Protection Agency.

(2) The term "construction," with respect to any project of construction under this chapter, means (A) the erection or building of new structures and acquisition of lands or interests therein, or the acquisition, replacement, expansion, remodeling, alteration, modernization, or extension of existing structures, and (B) the acquisition and installation of initial equipment of, or required in connection with, new or newly acquired structures or the expanded, remodeled, altered, modernized or extended part of existing structures (including trucks and other motor vehicles, and tractors, cranes, and other machinery) necessary for the proper utilization and operation of the facility after completion of the project; and includes preliminary planning to determine the economic and engineering feasibility and the public health and safety aspects of the project, the engineering, architectural, legal, fiscal, and economic investigations and studies, and any surveys, designs, plans, working drawings, specifications, and other action necessary for the carrying out of the project, and (C) the inspection and supervision of the process of carrying out the project to completion.

(2A) The term "demonstration" means the initial exhibition of a new technology process or practice or a significantly new combination or use of technologies, processes or practices, subsequent to the development stage, for the purpose of proving technological feasibility and cost effectiveness.

(3) The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

(4) The term "Federal agency" means any department, agency, or other instrumentality of the Federal Government, any independent agency or establishment of the Federal Government including any Government corporation, and the Government Printing Office.

(5) The term "hazardous waste" means a solid waste, or combination of solid wastes, which be-

cause of its quantity, concentration, or physical, chemical, or infectious characteristics may—

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

(6) The term "hazardous waste generation" means the act or process of producing hazardous waste.

(7) The term "hazardous waste management" means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes.

(8) For purposes of Federal financial assistance (other than rural communities assistance), the term "implementation" does not include the acquisition, leasing, construction, or modification of facilities or equipment or the acquisition, leasing, or improvement of land.

(9) The term "intermunicipal agency" means an agency established by two or more municipalities with responsibility for planning or administration of solid waste.

(10) The term "interstate agency" means an agency of two or more municipalities in different States, or an agency established by two or more States, with authority to provide for the management of solid wastes and serving two or more municipalities located in different States.

(11) The term "long-term contract" means, when used in relation to solid waste supply, a contract of sufficient duration to assure the viability of a resource recovery facility (to the extent that such viability depends upon solid waste supply).

(12) The term "manifest" means the form used for identifying the quantity, composition, and the origin, routing, and destination of hazardous waste during its transportation from the point of generation to the point of disposal, treatment, or storage.

(13) The term "municipality" (A) means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law, with responsibility for the planning or administration of solid waste management, or an Indian tribe or authorized tribal organization or Alaska Native village or organization, and (B) includes any rural community or unincorporated town or village or any other public entity for which an application for assistance is made by a State or political subdivision thereof.

(14) The term "open dump" means any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated under section 6944 of this title and which is not a facility for disposal of hazardous waste.

(15) The term "person" means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each depart-

ment, agency, and instrumentality of the United States.

(16) The term "procurement item" means any device, good, substance, material, product, or other item whether real or personal property which is the subject of any purchase, barter, or other exchange made to procure such item.

(17) The term "procuring agency" means any Federal agency, or any State agency or agency of a political subdivision of a State which is using appropriated Federal funds for such procurement, or any person contracting with any such agency with respect to work performed under such contract.

(18) The term "recoverable" refers to the capability and likelihood of being recovered from solid waste for a commercial or industrial use.

(19) The term "recovered material" means waste material and byproducts which have been recovered or diverted from solid waste, but such term does not include those materials and byproducts generated from, and commonly reused within, an original manufacturing process.

(20) The term "recovered resources" means material or energy recovered from solid waste.

(21) The term "resource conservation" means reduction of the amounts of solid waste that are generated, reduction of overall resource consumption, and utilization of recovered resources.

(22) The term "resource recovery" means the recovery of material or energy from solid waste.

(23) The term "resource recovery system" means a solid waste management system which provides for collection, separation, recycling, and recovery of solid wastes, including disposal of nonrecoverable waste residues.

(24) The term "resource recovery facility" means any facility at which solid waste is processed for the purpose of extracting, converting to energy, or otherwise separating and preparing solid waste for reuse.

(25) The term "regional authority" means the authority established or designated under section 6946 of this title.

(26) The term "sanitary landfill" means a facility for the disposal of solid waste which meets the criteria published under section 6944 of this title.

(26A) The term "sludge" means any solid, semisolid or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility or any other such waste having similar characteristics and effects.

(27) The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 U.S.C. 2011 et seq.].

(28) The term "solid waste management" means the systematic administration of activities which provide for the collection, source separation, storage, transportation, transfer, processing, treatment, and disposal of solid waste.

(29) The term "solid waste management facility" includes—

(A) any resource recovery system or component thereof,

(B) any system, program, or facility for resource conservation, and

(C) any facility for the collection, source separation, storage, transportation, transfer, processing, treatment or disposal of solid wastes, including hazardous wastes, whether such facility is associated with facilities generating such wastes or otherwise.

(30) The terms "solid waste planning", "solid waste management", and "comprehensive planning" include planning or management respecting resource recovery and resource conservation.

(31) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(32) The term "State authority" means the agency established or designated under section 6947 of this title.

(33) The term "storage", when used in connection with hazardous waste, means the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste.

(34) The term "treatment", when used in connection with hazardous waste, means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

(35) The term "virgin material" means a raw material, including previously unused copper, aluminum, lead, zinc, iron, or other metal or metal ore, any undeveloped resource that is, or with new technology will become, a source of raw materials.

(36) The term "used oil" means any oil which has been—

(A) refined from crude oil,

(B) used, and

(C) as a result of such use, contaminated by physical or chemical impurities.

(37) The term "recycled oil" means any used oil which is reused, following its original use, for any purpose (including the purpose for which the oil was originally used). Such term includes oil which is re-refined, reclaimed, burned, or reprocessed.

(38) The term "lubricating oil" means the fraction of crude oil which is sold for purposes of reducing friction in any industrial or mechanical device. Such term includes re-refined oil.

(39) The term "re-refined oil" means used oil from which the physical and chemical contaminants acquired through previous use have been removed through a refining process.

(40) Except as otherwise provided in this paragraph, the term "medical waste" means any solid waste which is generated in the diagnosis, treatment, or immunization of human beings or animals, in research pertaining thereto, or in the production or testing of biologicals. Such term does not include any hazardous waste identified or listed under subchapter III of this chapter or any household waste as defined in regulations under subchapter III of this chapter.

(41) The term "mixed waste" means waste that contains both hazardous waste and source, special nuclear, or by-product material subject to the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.).

(Pub. L. 89-272, title II, §1004, as added Pub. L. 94-580, §2, Oct. 21, 1976, 90 Stat. 2798; amended Pub. L. 95-609, §7(b), Nov. 8, 1978, 92 Stat. 3081; Pub. L. 96-463, §3, Oct. 15, 1980, 94 Stat. 2055; Pub. L. 96-482, §2, Oct. 21, 1980, 94 Stat. 2334; Pub. L. 100-582, §3, Nov. 1, 1988, 102 Stat. 2958; Pub. L. 102-386, title I, §§103, 105(b), Oct. 6, 1992, 106 Stat. 1507, 1512.)

REFERENCES IN TEXT

The Atomic Energy Act of 1954, referred to in pars. (27) and (41), is act Aug. 1, 1946, ch. 724, as added by act Aug. 30, 1954, ch. 1073, §1, 68 Stat. 921, and amended, which is classified generally to chapter 23 (§2011 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2011 of this title and Tables.

PRIOR PROVISIONS

Provisions similar to those in this section were contained in section 3252 of this title, prior to the general amendment of the Solid Waste Disposal Act by Pub. L. 94-580.

AMENDMENTS

1992—Par. (15). Pub. L. 102-386, §103, inserted before period at end "and shall include each department, agency, and instrumentality of the United States".

Par. (41). Pub. L. 102-386, §105(b), added par. (41).

1988—Par. (40). Pub. L. 100-582 added par. (40).

1980—Par. (14). Pub. L. 96-482, §2(a), defined "open dump" to include a facility, substituted requirement that disposal facility or site not be a sanitary landfill meeting section 6944 of this title criteria for prior requirement that disposal site not be a sanitary landfill within meaning of section 6944 of this title, and required that the disposal facility or site not be a facility for disposal of hazardous waste.

Par. (19). Pub. L. 96-482, §2(b), defined "recovered material" to cover byproducts, substituted provision for recovery or diversion of waste material and byproducts from solid waste for prior provision for collection or recovery of material from solid waste, and excluded materials and byproducts generated from and commonly reused within an original manufacturing process.

Pars. (36) to (39). Pub. L. 96-463, §3, added pars. (36) to (39).

1978—Par. (8). Pub. L. 95-609, §7(b)(1), struck out provision stating that employees' salaries due pursuant to subchapter IV of this chapter would not be included after Dec. 31, 1979.

Par. (10). Pub. L. 95-609, §7(b)(2), substituted "management" for "disposal".

Par. (29)(C). Pub. L. 95-609, §7(b)(3), substituted "the collection, source separation, storage, transportation, transfer, processing, treatment or disposal" for "the treatment".

TRANSFER OF FUNCTIONS

Enforcement functions of Administrator or other official of Environmental Protection Agency related to compliance with resource conservation and recovery permits used under this chapter with respect to preconstruction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, eff. July 1, 1979, §§102(a), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102-486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

§ 6904. Governmental cooperation

(a) Interstate cooperation

The provisions of this chapter to be carried out by States may be carried out by interstate agencies and provisions applicable to States may apply to interstate regions where such agencies and regions have been established by the respective States and approved by the Administrator. In any such case, action required to be taken by the Governor of a State, respecting regional designation shall be required to be taken by the Governor of each of the respective States with respect to so much of the interstate region as is within the jurisdiction of that State.

(b) Consent of Congress to compacts

The consent of the Congress is hereby given to two or more States to negotiate and enter into agreements or compacts, not in conflict with any law or treaty of the United States, for—

(1) cooperative effort and mutual assistance for the management of solid waste or hazardous waste (or both) and the enforcement of their respective laws relating thereto, and

(2) the establishment of such agencies, joint or otherwise, as they may deem desirable for making effective such agreements or compacts.

No such agreement or compact shall be binding or obligatory upon any State a party thereto unless it is agreed upon by all parties to the agreement and until it has been approved by the Administrator and the Congress.

(Pub. L. 89-272, title II, §1005, as added Pub. L. 94-580, §2, Oct. 21, 1976, 90 Stat. 2301.)

TRANSFER OF FUNCTIONS

For transfer of certain enforcement functions of Administrator or other official of Environmental Protection Agency under this chapter to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, and subsequent transfer to Secretary of Energy, then to Federal Coordinator for Alaska Natural Gas Transportation Projects, see note set out under section 6903 of this title.

TRANSFER OF FUNCTIONS

For transfer of certain enforcement functions of Administrator or other official of Environmental Protection Agency under this chapter to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, and subsequent transfer to Secretary of Energy, then to Federal Coordinator for Alaska Natural Gas Transportation Projects, see note set out under section 6968 of this title.

§ 6935. Restrictions on recycled oil**(a) In general**

Not later than one year after October 15, 1980, the Administrator shall promulgate regulations establishing such performance standards and other requirements as may be necessary to protect the public health and the environment from hazards associated with recycled oil. In developing such regulations, the Administrator shall conduct an analysis of the economic impact of the regulations on the oil recycling industry. The Administrator shall ensure that such regulations do not discourage the recovery or recycling of used oil, consistent with the protection of human health and the environment.

(b) Identification or listing of used oil as hazardous waste

Not later than twelve months after November 8, 1984, the Administrator shall propose whether to list or identify used automobile and truck crankcase oil as hazardous waste under section 6921 of this title. Not later than twenty-four months after November 8, 1984, the Administrator shall make a final determination whether to list or identify used automobile and truck crankcase oil and other used oil as hazardous wastes under section 6921 of this title.

(c) Used oil which is recycled

(1) With respect to generators and transporters of used oil identified or listed as a hazardous waste under section 6921 of this title, the standards promulgated under section¹ 6921(d), 6922, and 6923 of this title shall not apply to such used oil if such used oil is recycled.

(2)(A) In the case of used oil which is exempt under paragraph (1), not later than twenty-four months after November 8, 1984, the Administrator shall promulgate such standards under this subsection regarding the generation and transportation of used oil which is recycled as may be necessary to protect human health and the environment. In promulgating such regulations with respect to generators, the Administrator shall take into account the effect of such regulations on environmentally acceptable types of used oil recycling and the effect of such regulations on small quantity generators and generators which are small businesses (as defined by the Administrator).

(B) The regulations promulgated under this subsection shall provide that no generator of used oil which is exempt under paragraph (1) from the standards promulgated under section¹ 6921(d), 6922, and 6923 of this title shall be subject to any manifest requirement or any associated recordkeeping and reporting requirement with respect to such used oil if such generator—

(i) either—

(I) enters into an agreement or other arrangement (including an agreement or arrangement with an independent transporter or with an agent of the recycler) for delivery of such used oil to a recycling facility which has a permit under section 6925(c) of this title (or for which a valid permit is deemed to be in effect under subsection (d) of this section), or

(II) recycles such used oil at one or more facilities of the generator which has such a permit under section 6925 of this title (or for which a valid permit is deemed to have been issued under subsection (d) of this section);

(ii) such used oil is not mixed by the generator with other types of hazardous wastes; and

(iii) the generator maintains such records relating to such used oil, including records of agreements or other arrangements for delivery of such used oil to any recycling facility referred to in clause (i)(I), as the Administrator deems necessary to protect human health and the environment.

(3) The regulations under this subsection regarding the transportation of used oil which is exempt from the standards promulgated under section¹ 6921(d), 6922, and 6923 of this title under paragraph (1) shall require the transporters of such used oil to deliver such used oil to a facility which has a valid permit under section 6925 of this title or which is deemed to have a valid permit under subsection (d) of this section. The Administrator shall also establish other standards for such transporters as may be necessary to protect human health and the environment.

(d) Permits

(1) The owner or operator of a facility which recycles used oil which is exempt under subsection (c)(1) of this section, shall be deemed to have a permit under this subsection for all such treatment or recycling (and any associated tank or container storage) if such owner and operator comply with standards promulgated by the Administrator under section 6924 of this title; except that the Administrator may require such owners and operators to obtain an individual permit under section 6925(c) of this title if he determines that an individual permit is necessary to protect human health and the environment.

(2) Notwithstanding any other provision of law, any generator who recycles used oil which is exempt under subsection (c)(1) of this section shall not be required to obtain a permit under section 6925(c) of this title with respect to such used oil until the Administrator has promulgated standards under section 6924 of this title regarding the recycling of such used oil.

(Pub. L. 89-272, title II, § 3014, formerly § 3012, as added Pub. L. 96-463, § 7(a), Oct. 15, 1980, 94 Stat. 2057, and renumbered and amended Pub. L. 98-616, title II, §§ 241(a), 242, title V, § 502(g)(1), Nov. 8, 1984, 98 Stat. 3258, 3260, 3277.)

CODIFICATION

Section was formerly classified to section 6932 of this title.

AMENDMENTS

1984—Subsec. (a). Pub. L. 98-616, §§ 241(a), 242, designated existing provisions as subsec. (a) and inserted

¹ So in original. Probably should be "sections".

“, consistent with the protection of human health and the environment” at end.

Subsecs. (b) to (d). Pub. L. 98-616, §241(a), added subsecs. (b) to (d).

TRANSFER OF FUNCTIONS

For transfer of certain enforcement functions of Administrator or other official of Environmental Protection Agency under this chapter to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, and subsequent transfer to Secretary of Energy, then to Federal Coordinator for Alaska Natural Gas Transportation Projects, see note set out under section 6903 of this title.

§ 6936. Expansion during interim status

(a) Waste piles

The owner or operator of a waste pile qualifying for the authorization to operate under section 6925(e) of this title shall be subject to the same requirements for liners and leachate collection systems or equivalent protection provided in regulations promulgated by the Administrator under section 6924 of this title before October 1, 1982, or revised under section 6924(o) of this title (relating to minimum technological requirements), for new facilities receiving individual permits under subsection (c) of section 6925 of this title, with respect to each new unit, replacement of an existing unit, or lateral expansion of an existing unit that is within the waste management area identified in the permit application submitted under section 6925 of this title, and with respect to waste received beginning six months after November 8, 1984.

(b) Landfills and surface impoundments

(1) The owner or operator of a landfill or surface impoundment qualifying for the authorization to operate under section 6925(e) of this title shall be subject to the requirements of section 6924(c) of this title (relating to minimum technological requirements), with respect to each new unit, replacement of an existing unit, or lateral expansion of an existing unit that is within the waste management area identified in the permit application submitted under this section, and with respect to waste received beginning 6 months after November 8, 1984.

(2) The owner or operator of each unit referred to in paragraph (1) shall notify the Administrator (or the State, if appropriate) at least sixty days prior to receiving waste. The Administrator (or the State) shall require the filing, within six months of receipt of such notice, of an application for a final determination regarding the issuance of a permit for each facility submitting such notice.

(3) In the case of any unit in which the liner and leachate collection system has been installed pursuant to the requirements of this section and in good faith compliance with the Administrator's regulations and guidance documents governing liners and leachate collection systems, no liner or leachate collection system which is different from that which was so installed pursuant to this section shall be required for such unit by the Administrator when issuing the first permit under section 6925 of this title to such facility, except that the Administrator shall not be precluded from requiring installation of a new liner when the Administrator has

reason to believe that any liner installed pursuant to the requirements of this section is leaking. The Administrator may, under section 6924 of this title, amend the requirements for liners and leachate collection systems required under this section as may be necessary to provide additional protection for human health and the environment.

(Pub. L. 99-272, title II, §3015, as added Pub. L. 98-616, title II, §243(a), Nov. 8, 1984, 98 Stat. 3260.)

§ 6937. Inventory of Federal agency hazardous waste facilities

(a) Program requirement; submission; availability; contents

Each Federal agency shall undertake a continuing program to compile, publish, and submit to the Administrator (and to the State in the case of sites in States having an authorized hazardous waste program) an inventory of each site which the Federal agency owns or operates or has owned or operated at which hazardous waste is stored, treated, or disposed of or has been disposed of at any time. The inventory shall be submitted every two years beginning January 31, 1996. Such inventory shall be available to the public as provided in section 6927(b) of this title. Information previously submitted by a Federal agency under section 9608 of this title, or under section 6925 or 6930 of this title, or under this section need not be resubmitted except that the agency shall update any previous submission to reflect the latest available data and information. The inventory shall include each of the following:

(1) A description of the location of each site at which any such treatment, storage, or disposal has taken place before the date on which permits are required under section 6925 of this title for such storage, treatment, or disposal, and where hazardous waste has been disposed, a description of hydrogeology of the site and the location of withdrawal wells and surface water within one mile of the site.

(2) Such information relating to the amount, nature, and toxicity of the hazardous waste in each site as may be necessary to determine the extent of any health hazard which may be associated with any site.

(3) Information on the known nature and extent of environmental contamination at each site, including a description of the monitoring data obtained.

(4) Information concerning the current status of the site, including information respecting whether or not hazardous waste is currently being treated, stored, or disposed of at such site (and if not, the date on which such activity ceased) and information respecting the nature of any other activity currently carried out at such site.

(5) A list of sites at which hazardous waste has been disposed and environmental monitoring data has not been obtained, and the reasons for the lack of monitoring data at each site.

(6) A description of response actions undertaken or contemplated at contaminated sites.

(7) An identification of the types of techniques of waste treatment, storage, or disposal which have been used at each site.

Office of Federal Inspector for the Alaska Natural Gas Transportation System, and subsequent transfer to Secretary of Energy, then to Federal Coordinator for Alaska Natural Gas Transportation Projects, see note set out under section 6903 of this title.

§ 6975. Separability

If any provision of this chapter, or the application of any provision of this chapter to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this chapter, shall not be affected thereby.

(Pub. L. 89-272, title II, § 7005, as added Pub. L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2827.)

§ 6976. Judicial review

(a) Review of final regulations and certain petitions

Any judicial review of final regulations promulgated pursuant to this chapter and the Administrator's denial of any petition for the promulgation, amendment, or repeal of any regulation under this chapter shall be in accordance with sections 701 through 706 of title 5, except that—

(1) a petition for review of action of the Administrator in promulgating any regulation, or requirement under this chapter or denying any petition for the promulgation, amendment or repeal of any regulation under this chapter may be filed only in the United States Court of Appeals for the District of Columbia, and such petition shall be filed within ninety days from the date of such promulgation or denial, or after such date if such petition for review is based solely on grounds arising after such ninetieth day; action of the Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in civil or criminal proceedings for enforcement; and

(2) in any judicial proceeding brought under this section in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if a party seeking review under this chapter applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that the information is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, and to be adduced upon the hearing in such manner and upon such terms and conditions as the court may deem proper; the Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file with the court such modified or new findings and his recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(b) Review of certain actions under sections 6925 and 6926 of this title

Review of the Administrator's action (1) in issuing, denying, modifying, or revoking any per-

mit under section 6925 of this title (or in modifying or revoking any permit which is deemed to have been issued under section 6935(d)(1)¹ of this title), or (2) in granting, denying, or withdrawing authorization or interim authorization under section 6926 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such issuance, denial, modification, revocation, grant, or withdrawal, or after such date only if such application is based solely on grounds which arose after such ninetieth day. Action of the Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in civil or criminal proceedings for enforcement. Such review shall be in accordance with sections 701 through 706 of title 5.

(Pub. L. 89-272, title II, § 7006, as added Pub. L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2827; amended Pub. L. 96-482, § 27, Oct. 21, 1980, 94 Stat. 2349; Pub. L. 98-616, title II, § 241(b)(1), title IV, § 403(d)(5), Nov. 8, 1984, 98 Stat. 3259, 3273.)

REFERENCES IN TEXT

Section 6935(d)(1) of this title, referred to in subsec. (b), was in the original a reference to section 3012(d)(1) of Pub. L. 89-272, which was renumbered section 3014(d)(1) of Pub. L. 89-272 by Pub. L. 98-616 and is classified to section 6935(d)(1) of this title.

AMENDMENTS

1984—Pub. L. 98-616 inserted “(or in modifying or revoking any permit which is deemed to have been issued under section 6935(d)(1) of this title)” and inserted “Action of the Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in civil or criminal proceedings for enforcement.”

1980—Pub. L. 96-482, § 27(a), designated existing provisions as subsec. (a), in provision preceding par. (1), included judicial review of Administrator's denial of any petition for promulgation, amendment, or repeal of any regulation in par. (1), included review of Administrator's denial of any petition for promulgation, amendment, or repeal of any regulation, and substituted “District of Columbia, and” for “District of Columbia. Any”, “date of such promulgation or denial” for “date of such promulgation”, “petition for review is based” for “petition is based”, and “; action” for “. Action”, and in par. (2), substituted “proper; the” for “proper. The”, and added subsec. (b).

TRANSFER OF FUNCTIONS

For transfer of certain enforcement functions of Administrator or other official of Environmental Protection Agency under this chapter to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, and subsequent transfer to Secretary of Energy, then to Federal Coordinator for Alaska Natural Gas Transportation Projects, see note set out under section 6903 of this title.

§ 6977. Grants or contracts for training projects

(a) General authority

The Administrator is authorized to make grants to, and contracts with any eligible orga-

¹ See References in Text note below.

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Uppermost aquifer means the geologic formation nearest the natural ground surface that is an aquifer, as well as lower aquifers that are hydraulically interconnected with this aquifer within the facility's property boundary.

Used oil means any oil that has been refined from crude oil, or any synthetic oil, that has been used and as a result of such use is contaminated by physical or chemical impurities.

User of the electronic manifest system means a hazardous waste generator, a hazardous waste transporter, an owner or operator of a hazardous waste treatment, storage, recycling, or disposal facility, or any other person that:

(1) Is required to use a manifest to comply with:

(i) Any federal or state requirement to track the shipment, transportation, and receipt of hazardous waste or other waste material that is shipped from the site of generation to an off-site designated facility for treatment, storage, recycling, or disposal; or

(ii) Any federal or state requirement to track the shipment, transportation, and receipt of rejected wastes or regulated container residues that are shipped from a designated facility to an alternative facility, or returned to the generator; and

(2) Elects to use the system to obtain, complete and transmit an electronic manifest format supplied by the EPA electronic manifest system, or

(3) Elects to use the paper manifest form and submits to the system for data processing purposes a paper copy of the manifest (or data from such a paper copy), in accordance with §264.71(a)(2)(v) or §265.71(a)(2)(v) of this chapter. These paper copies are submitted for data exchange purposes only and are not the official copies of record for legal purposes.

Vessel includes every description of watercraft, used or capable of being used as a means of transportation on the water.

Wastewater treatment unit means a device which:

(1) Is part of a wastewater treatment facility that is subject to regulation under either section 402 or 307(b) of the Clean Water Act; and

(2) Receives and treats or stores an influent wastewater that is a haz-

ardous waste as defined in §261.3 of this chapter, or that generates and accumulates a wastewater treatment sludge that is a hazardous waste as defined in §261.3 of this chapter, or treats or stores a wastewater treatment sludge which is a hazardous waste as defined in §261.3 of this Chapter; and

(3) Meets the definition of tank or tank system in §260.10 of this chapter.

Water (bulk shipment) means the bulk transportation of hazardous waste which is loaded or carried on board a vessel without containers or labels.

Well means any shaft or pit dug or bored into the earth, generally of a cylindrical form, and often walled with bricks or tubing to prevent the earth from caving in.

Well injection: (See "underground injection".)

Zone of engineering control means an area under the control of the owner/operator that, upon detection of a hazardous waste release, can be readily cleaned up prior to the release of hazardous waste or hazardous constituents to ground water or surface water.

Wipe means a woven or non-woven shop towel, rag, pad, or swab made of wood pulp, fabric, cotton, polyester blends, or other material.

[45 FR 33073, May 19, 1990]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §260.10, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

EFFECTIVE DATE NOTE: At 80 FR 1771, Jan. 13, 2015, §260.10 was amended by adding in alphabetical order the definition of "Contained" and removing the definition of "Hazardous secondary material generated and reclaimed under the control of the generator" and adding in alphabetical order the definition of "Remanufacturing", effective July 13, 2015. For the convenience of the user, the added text is set forth as follows:

§260.10 Definitions

* * * * *

Contained means held in a unit (including a land-based unit as defined in this subpart) that meets the following criteria:

(1) The unit is in good condition, with no leaks or other continuing or intermittent unpermitted releases of the hazardous secondary materials to the environment, and is designed, as appropriate for the hazardous

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secondary materials, to prevent releases of hazardous secondary materials to the environment. Unpermitted releases are releases that are not covered by a permit (such as a permit to discharge to water or air) and may include, but are not limited to, releases through surface transport by precipitation runoff, releases to soil and groundwater, wind-blown dust, fugitive air emissions, and catastrophic unit failures;

(2) The unit is properly labeled or otherwise has a system (such as a log) to immediately identify the hazardous secondary materials in the unit; and

(3) The unit holds hazardous secondary materials that are compatible with other hazardous secondary materials placed in the unit and is compatible with the materials used to construct the unit and addresses any potential risks of fires or explosions.

(4) Hazardous secondary materials in units that meet the applicable requirements of 40 CFR parts 264 or 265 are presumptively contained.

* * * * *

Remanufacturing means processing a higher-value hazardous secondary material in order to manufacture a product that serves a similar functional purpose as the original commercial-grade material. For the purpose of this definition, a hazardous secondary material is considered higher-value if it was generated from the use of a commercial-grade material in a manufacturing process and can be remanufactured into a similar commercial-grade material.

§260.11 References.

(a) When used in parts 260 through 263 and 278 of this chapter, the following publications are incorporated by reference. These incorporations by reference were approved by the Director of the Federal Register pursuant to 5 U.S.C. 552(a) and 1 CFR part 51. These materials are incorporated as they exist on the date of approval and a notice of any change in these materials will be published in the FEDERAL REGISTER. Copies may be inspected at the Library, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW, (3405T), Washington, DC 20460, libraryhq@epa.gov; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202-741-6030, or go to: http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.

(b) The following materials are available for purchase from the American Society for Testing and Materials, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428-2959.

(1) ASTM D-93-79 or D-93-80, "Standard Test Methods for Flash Point by Pensky-Martens Closed Cup Tester," IBR approved for §261.21.

(2) ASTM D-1946-82, "Standard Method for Analysis of Reformed Gas by Gas Chromatography," IBR approved for §§264.1063, 265.1063.

(3) ASTM D 2267-88, "Standard Test Method for Aromatics in Light Naphthas and Aviation Gasolines by Gas Chromatography," IBR approved for §264.1063.

(4) ASTM D 2382-83, "Standard Test Method for Heat of Combustion of Hydrocarbon Fuels by Bomb Calorimeter (High-Precision Method)," IBR approved for §§264.1063, 265.1063.

(5) ASTM D 2879-92, "Standard Test Method for Vapor Pressure—Temperature Relationship and Initial Decomposition Temperature of Liquids by Isoteniscope," IBR approved for §265.1064.

(6) ASTM D-3278-78, "Standard Test Methods for Flash Point for Liquids by Setaflash Closed Tester," IBR approved for §261.21(a).

(7) ASTM E 168-89, "Standard Practices for General Techniques of Infrared Quantitative Analysis," IBR approved for §264.1063.

(8) ASTM E 169-87, "Standard Practices for General Techniques of Ultraviolet-Visible Quantitative Analysis," IBR approved for §264.1063.

(9) ASTM E 260-85, "Standard Practice for Packed Column Gas Chromatography," IBR approved for §264.1063.

(10) ASTM E 926-88, "Standard Test Methods for Preparing Refuse-Derived Fuel (RDF) Samples for Analyses of Metals," Test Method C—Bomb, Acid Digestion Method.

(c) The following materials are available for purchase from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161; or for purchase from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, (202) 512-1300.

(1) "APTI Course 415: Control of Gaseous Emissions," EPA Publication

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(c) Materials that have been reclaimed but must be reclaimed further before the materials are completely recovered.

(d) Hazardous secondary materials that are reclaimed in a continuous industrial process; and

(e) Hazardous secondary materials that are indistinguishable in all relevant aspects from a product or intermediate.

[50 FR 601, Jan. 4, 1995; 50 FR 14219, Apr. 11, 1985, as amended at 59 FR 49041, Sept. 19, 1994; 73 FR 64758, Oct. 30, 2008]

EFFECTIVE DATE NOTE: At 80 FR 1771, Jan. 12, 2015, §260.30 was amended by adding paragraph (f), effective July 13, 2015. For the convenience of the user, the added text is set forth as follows:

§260.30 Non-waste determinations and variances from classification as a solid waste.

* * * * *

(f) Hazardous secondary materials that are transferred for reclamation under §261.4(a)(21) and are managed at a verified reclamation facility or intermediate facility where the management of the hazardous secondary materials is not addressed under a RCRA Part B permit or interim status standards.

§260.31 Standards and criteria for variances from classification as a solid waste.

(a) The Administrator may grant requests for a variance from classifying as a solid waste those materials that are accumulated speculatively without sufficient amounts being recycled if the applicant demonstrates that sufficient amounts of the material will be recycled or transferred for recycling in the following year. If a variance is granted, it is valid only for the following year, but can be renewed, on an annual basis, by filing a new application. The Administrator's decision will be based on the following criteria:

(1) The manner in which the material is expected to be recycled, when the material is expected to be recycled, and whether this expected disposition is likely to occur (for example, because of past practice, market factors, the nature of the material, or contractual arrangements for recycling);

(2) The reason that the applicant has accumulated the material for one or more years without recycling 75 percent of the volume accumulated at the beginning of the year;

(3) The quantity of material already accumulated and the quantity expected to be generated and accumulated before the material is recycled;

(4) The extent to which the material is handled to minimize loss;

(5) Other relevant factors.

(b) The Administrator may grant requests for a variance from classifying as a solid waste those materials that are reclaimed and then reused as feedstock within the original production process in which the materials were generated if the reclamation operation is an essential part of the production process. This determination will be based on the following criteria:

(1) How economically viable the production process would be if it were to use virgin materials, rather than reclaimed materials;

(2) The extent to which the material is handled before reclamation to minimize loss;

(3) The time periods between generating the material and its reclamation, and between reclamation and return to the original primary production process;

(4) The location of the reclamation operation in relation to the production process;

(5) Whether the reclaimed material is used for the purpose for which it was originally produced when it is returned to the original process, and whether it is returned to the process in substantially its original form;

(6) Whether the person who generates the material also reclaims it;

(7) Other relevant factors.

(c) The Regional Administrator may grant requests for a variance from classifying as a solid waste those materials that have been reclaimed but must be reclaimed further before recovery is completed if, after initial reclamation, the resulting material is commodity-like (even though it is not yet a commercial product, and has to be reclaimed further). This determination will be based on the following factors:

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(1) The degree of processing the material has undergone and the degree of further processing that is required;

(2) The value of the material after it has been reclaimed;

(3) The degree to which the reclaimed material is like an analogous raw material;

(4) The extent to which an end market for the reclaimed material is guaranteed;

(5) The extent to which the reclaimed material is handled to minimize loss;

(6) Other relevant factors.

[50 FR 662, Jan. 4, 1985, as amended at 59 FR 48041, Sept. 19, 1994; 71 FR 16902, Apr. 4, 2006]

EFFECTIVE DATE NOTE: At 80 FR 1771, Jan. 13, 2015, § 260.31 was amended by revising paragraph (c) and adding paragraph (d), effective July 13, 2015. For the convenience of the user, the revised and added text is set forth as follows:

§ 260.31 Standards and criteria for variances from classification as a solid waste.

* * * * *

(c) The Administrator may grant requests for a variance from classifying as a solid waste those hazardous secondary materials that have been partially reclaimed, but must be reclaimed further before recovery is completed, if the partial reclamation has produced a commodity-like material. A determination that a partially-reclaimed material for which the variance is sought is commodity-like will be based on whether the hazardous secondary material is legitimately recycled as specified in § 260.43 of this part and on whether all of the following decision criteria are satisfied:

(1) Whether the degree of partial reclamation the material has undergone is substantial as demonstrated by using a partial reclamation process other than the process that generated the hazardous waste;

(2) Whether the partially-reclaimed material has sufficient economic value that it will be purchased for further reclamation;

(3) Whether the partially-reclaimed material is a viable substitute for a product or intermediate produced from virgin or raw materials which is used in subsequent production steps;

(4) Whether there is a market for the partially-reclaimed material as demonstrated by known customer(s) who are further reclaiming the material (*e.g.*, records of sales and/or contracts and evidence of subsequent use, such as bills of lading);

(5) Whether the partially-reclaimed material is handled to minimize loss.

(d) The Administrator may grant requests for a variance from classifying as a solid waste those hazardous secondary materials that are transferred for reclamation under § 261.4(a)(24) and are managed at a verified reclamation facility or intermediate facility where the management of the hazardous secondary materials is not addressed under a RCRA Part B permit or interim status standards. The Administrator's decision will be based on the following criteria:

(1) The reclamation facility or intermediate facility must demonstrate that the reclamation process for the hazardous secondary materials is legitimate pursuant to § 260.43;

(2) The reclamation facility or intermediate facility must satisfy the financial assurance condition in § 261.4(a)(24)(vi)(F);

(3) The reclamation facility or intermediate facility must not be subject to a formal enforcement action in the previous three years and not be classified as a significant non-complier under RCRA Subtitle C, or must provide credible evidence that the facility will manage the hazardous secondary materials properly. Credible evidence may include a demonstration that the facility has taken remedial steps to address the violations and prevent future violations, or that the violations are not relevant to the proper management of the hazardous secondary materials;

(4) The intermediate or reclamation facility must have the equipment and trained personnel needed to safely manage the hazardous secondary material and must meet emergency preparedness and response requirements under 40 CFR part 261 subpart M;

(5) If residuals are generated from the reclamation of the excluded hazardous secondary materials, the reclamation facility must have the permits required (if any) to manage the residuals, have a contract with an appropriately permitted facility to dispose of the residuals or present credible evidence that the residuals will be managed in a manner that is protective of human health and the environment, and

(6) The intermediate or reclamation facility must address the potential for risk to proximate populations from unpermitted releases of the hazardous secondary material to the environment (*i.e.*, releases that are not covered by a permit, such as a permit to discharge to water or air), which may include, but are not limited to, potential releases through surface transport by precipitation runoff, releases to soil and groundwater, wind-blown dust, fugitive air emissions, and catastrophic unit failures), and must include consideration of potential cumulative risks from other nearby potential stressors.

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one or both of these factors is still legitimate, persons can consider the protectiveness of the storage methods, exposure from toxics in the product, the bioavailability of the toxics in the product, and other relevant considerations.

[73 FR 64756, Oct. 30, 2008]

EFFECTIVE DATE NOTE: At 80 FR 1772, Jan. 13, 2015, §260.43 was amended by revising the section heading and paragraph (a) and removing and reserving paragraphs (b) and (c), effective July 13, 2015. For the convenience of the user, revised text is set forth as follows:

§ 260.43 Legitimate recycling of hazardous secondary materials.

(a) Recycling of hazardous secondary materials for the purpose of the exclusions or exemptions from the hazardous waste regulations must be legitimate. Hazardous secondary material that is not legitimately recycled is discarded material and is a solid waste. In determining if their recycling is legitimate, persons must address all the requirements of this paragraph.

(1) Legitimate recycling must involve a hazardous secondary material that provides a useful contribution to the recycling process or to a product or intermediate of the recycling process. The hazardous secondary material provides a useful contribution if it:

- (i) Contributes valuable ingredients to a product or intermediate; or
- (ii) Replaces a catalyst or carrier in the recycling process; or
- (iii) Is the source of a valuable constituent recovered in the recycling process; or
- (iv) Is recovered or regenerated by the recycling process; or
- (v) Is used as an effective substitute for a commercial product.

(2) The recycling process must produce a valuable product or intermediate. The product or intermediate is valuable if it is:

- (i) Sold to a third party; or
- (ii) Used by the recycler or the generator as an effective substitute for a commercial product or as an ingredient or intermediate in an industrial process.

(3) The generator and the recycler must manage the hazardous secondary material as a valuable commodity when it is under their control. Where there is an analogous raw material, the hazardous secondary material must be managed, at a minimum, in a manner consistent with the management of the raw material or in an equally protective manner. Where there is no analogous raw material, the hazardous secondary material must be contained. Hazardous secondary materials that are released to the environment and are not recovered immediately are discarded.

(4) The product of the recycling process must be comparable to a legitimate product or intermediate:

(i) Where there is an analogous product or intermediate, the product of the recycling process is comparable to a legitimate product or intermediate if:

(A) The product of the recycling process does not exhibit a hazardous characteristic (as defined in part 261 subpart C) that analogous products do not exhibit, and

(B) The concentrations of any hazardous constituents found in appendix VIII of part 261 of this chapter that are in the product or intermediate are at levels that are comparable to or lower than those found in analogous products or at levels that meet widely-recognized commodity standards and specifications, in the case where the commodity standards and specifications include levels that specifically address those hazardous constituents.

(ii) Where there is no analogous product, the product of the recycling process is comparable to a legitimate product or intermediate if:

(A) The product of the recycling process is a commodity that meets widely recognized commodity standards and specifications (e.g., commodity specification grades for common metals), or

(B) The hazardous secondary materials being recycled are returned to the original process or processes from which they were generated to be reused (e.g., closed loop recycling).

(iii) If the product of the recycling process has levels of hazardous constituents that are not comparable to or unable to be compared to a legitimate product or intermediate per paragraph (a)(4)(i) or (ii) of this section, the recycling still may be shown to be legitimate, if it meets the following specified requirements. The person performing the recycling must conduct the necessary assessment and prepare documentation showing why the recycling is, in fact, still legitimate. The recycling can be shown to be legitimate based on lack of exposure from toxics in the product, lack of the bioavailability of the toxics in the product, or other relevant considerations which show that the recycled product does not contain levels of hazardous constituents that pose a significant human health or environmental risk. The documentation must include a certification statement that the recycling is legitimate and must be maintained on-site for three years after the recycling operation has ceased. The person performing the recycling must notify the Regional Administrator of this activity using EPA Form 8700-12.

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(9) "Excluded scrap metal" is processed scrap metal, unprocessed home scrap metal, and unprocessed prompt scrap metal.

(10) "Processed scrap metal" is scrap metal which has been manually or physically altered to either separate it into distinct materials to enhance economic value or to improve the handling of materials. Processed scrap metal includes, but is not limited to scrap metal which has been baled, shredded, sheared, chopped, crushed, flattened, cut, melted, or separated by metal type (i.e., sorted), and, fines, drosses and related materials which have been agglomerated. (Note: shredded circuit boards being sent for recycling are not considered processed scrap metal. They are covered under the exclusion from the definition of solid waste for shredded circuit boards being recycled (§261.4(a)(14)).

(11) "Home scrap metal" is scrap metal as generated by steel mills, foundries, and refineries such as turnings, cuttings, punchings, and borings.

(12) "Prompt scrap metal" is scrap metal as generated by the metal working/fabrication industries and includes such scrap metal as turnings, cuttings, punchings, and borings. Prompt scrap is also known as industrial or new scrap metal.

[45 FR 35119, May 19, 1980, as amended at 48 FR 14293, Apr. 1, 1983; 50 FR 663, Jan. 4, 1985; 51 FR 19174, Mar. 24, 1986; 51 FR 40636, Nov. 7, 1986; 62 FR 26019, May 12, 1997; 73 FR 64760, Oct. 30, 2008; 75 FR 13001, Mar. 18, 2010]

EFFECTIVE DATE NOTE: At 80 FR 1773, Jan. 13, 2015, §261.1 was amended by revising paragraphs (c)(4) and (9), effective July 13, 2015. For the convenience of the user, the revised text is set forth as follows:

§261.1 Purpose and scope.

* * * * *

(c) * * *

(4) A material is "reclaimed" if it is processed to recover a usable product, or if it is regenerated. Examples are recovery of lead values from spent batteries and regeneration of spent solvents. In addition, for purposes of §261.4(a)(23) and (24), smelting, melting, and refining furnaces are considered to be solely engaged in metals reclamation if the metal recovery from the hazardous secondary materials meets the same requirements as those

specified for metals recovery from hazardous waste found in §266.100(d)(1) through (3) of this chapter, and if the residuals meet the requirements specified in §266.112 of this chapter.

* * * * *

(9) A material is "accumulated speculatively" if it is accumulated before being recycled. A material is not accumulated speculatively, however, if the person accumulating it can show that the material is potentially recyclable and has a feasible means of being recycled; and that—during the calendar year (commencing on January 1)—the amount of material that is recycled, or transferred to a different site for recycling, equals at least 75 percent by weight or volume of the amount of that material accumulated at the beginning of the period. Materials must be placed in a storage unit with a label indicating the first date that the material began to be accumulated. If placing a label on the storage unit is not practicable, the accumulation period must be documented through an inventory log or other appropriate method. In calculating the percentage of turnover, the 75 percent requirement is to be applied to each material of the same type (e.g., slags from a single smelting process) that is recycled in the same way (i.e., from which the same material is recovered or that is used in the same way). Materials accumulating in units that would be exempt from regulation under §261.4(c) are not to be included in making the calculation. Materials that are already defined as solid wastes also are not to be included in making the calculation. Materials are no longer in this category once they are removed from accumulation for recycling, however.

§261.2 Definition of solid waste.

(a)(1) A *solid waste* is any discarded material that is not excluded under §261.4(a) or that is not excluded by a variance granted under §§260.30 and 260.31 or that is not excluded by a non-waste determination under §§260.30 and 260.34.

(2)(i) A *discarded material* is any material which is:

(A) Abandoned, as explained in paragraph (b) of this section; or

(B) Recycled, as explained in paragraph (c) of this section; or

(C) Considered inherently waste-like, as explained in paragraph (d) of this section; or

(D) A military munition identified as a solid waste in §266.202.

(ii) A hazardous secondary material is not discarded if it is generated and

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reclaimed under the control of the generator as defined in §260.10, it is not speculatively accumulated as defined in §261.1(c)(8), it is handled only in non-land-based units and is contained in such units, it is generated and reclaimed within the United States and its territories, it is not otherwise subject to material-specific management conditions under §261.4(a) when reclaimed, it is not a spent lead acid battery (see §266.80 and §273.2), it does not meet the listing description for K171 or K172 in §261.32, and the reclamation of the material is legitimate, as specified under §260.43. (See also the notification requirements of §260.42). (For hazardous secondary materials managed in land-based units, see §261.4(a)(23)).

(b) Materials are solid waste if they are *abandoned* by being:

- (1) Disposed of; or
- (2) Burned or incinerated; or
- (3) Accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated.

(c) Materials are solid wastes if they are *recycled*—or accumulated, stored, or treated before recycling—as specified in paragraphs (c)(1) through (4) of this section.

(1) *Used in a manner constituting disposal.* (i) Materials noted with a “*” in Column 1 of Table 1 are solid wastes when they are:

(A) Applied to or placed on the land in a manner that constitutes disposal; or

(B) Used to produce products that are applied to or placed on the land or are otherwise contained in products that are applied to or placed on the land (in which cases the product itself remains a solid waste).

(ii) However, commercial chemical products listed in §261.33 are not solid wastes if they are applied to the land and that is their ordinary manner of use.

(2) *Burning for energy recovery.* (i) Materials noted with a “*” in column 2 of Table 1 are solid wastes when they are:

(A) Burned to recover energy;

(B) Used to produce a fuel or are otherwise contained in fuels (in which cases the fuel itself remains a solid waste).

(ii) However, commercial chemical products listed in §261.33 are not solid wastes if they are themselves fuels.

(3) *Reclaimed.* Materials noted with a “—” in column 3 of Table 1 are not solid wastes when reclaimed. Materials noted with an “*” in column 3 of Table 1 are solid wastes when reclaimed unless they meet the requirements of §§261.2(a)(2)(ii), or 261.4(a)(17), or 261.4(a)(23), or 261.4(a)(24) or 261.4(a)(25).

(4) *Accumulated speculatively.* Materials noted with a “*” in column 4 of Table 1 are solid wastes when accumulated speculatively.

TABLE 1

	Use constituting disposal (§261.2(c)(1))	Energy recovery/ fuel (§261.2(c)(2))	Reclamation (261.2(c)(3)), except as provided in §§261.2(a)(2)(ii), 261.4(a)(17), 261.4(a)(23), 261.4(a)(24), or 261.4(a)(25)	Speculative accumulation (§261.2(c)(4))
	1	2	3	4
Spent Materials	(*)	(*)	(*)	(*)
Sludges (listed in 40 CFR Part 261.31 or 261.32)	(*)	(*)	(*)	(*)
Sludges exhibiting a characteristic of hazardous waste	(*)	(*)	—	(*)
By-products (listed in 40 CFR 261.31 or 261.32)	(*)	(*)	(*)	(*)
By-products exhibiting a characteristic of hazardous waste	(*)	(*)	—	(*)
Commercial chemical products listed in 40 CFR 261.33	(*)	(*)	—	—

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TABLE 1—Continued

	Use constituting disposal (§ 261.2(c)(1))	Energy recovery/ fuel (§ 261.2(c)(2))	Reclamation (261.2(c)(3)), except as provided in §§ 261.2(a)(2)(ii), 261.4(a)(17), 261.4(a)(23), 261.4(a)(24), or 261.4(a)(25)	Speculative accumulation (§ 261.2(c)(4))
	1	2	3	4
Scrap metal that is not excluded under § 261.4(a)(13)	(*)	(*)	(*)	(*)

Note: The terms "spent materials," "sludges," "by-products," and "scrap metal" and "processed scrap metal" are defined in § 261.1.

(d) *Inherently waste-like materials.* The following materials are solid wastes when they are recycled in any manner:

(1) Hazardous Waste Nos. F020, F021 (unless used as an ingredient to make a product at the site of generation), F022, F023, F026, and F028.

(2) Secondary materials fed to a halogen acid furnace that exhibit a characteristic of a hazardous waste or are listed as a hazardous waste as defined in subparts C or D of this part, except for brominated material that meets the following criteria:

- (i) The material must contain a bromine concentration of at least 45%; and
- (ii) The material must contain less than a total of 1% of toxic organic compounds listed in appendix VIII; and
- (iii) The material is processed continually on-site in the halogen acid furnace via direct conveyance (hard piping).

(3) The Administrator will use the following criteria to add wastes to that list:

(i)(A) The materials are ordinarily disposed of, burned, or incinerated; or

(B) The materials contain toxic constituents listed in appendix VIII of part 261 and these constituents are not ordinarily found in raw materials or products for which the materials substitute (or are found in raw materials or products in smaller concentrations) and are not used or reused during the recycling process; and

(ii) The material may pose a substantial hazard to human health and the environment when recycled.

(e) *Materials that are not solid waste when recycled.* (1) Materials are not

solid wastes when they can be shown to be recycled by being:

(i) Used or reused as ingredients in an industrial process to make a product, provided the materials are not being reclaimed; or

(ii) Used or reused as effective substitutes for commercial products; or

(iii) Returned to the original process from which they are generated, without first being reclaimed or land disposed. The material must be returned as a substitute for feedstock materials. In cases where the original process to which the material is returned is a secondary process, the materials must be managed such that there is no placement on the land. In cases where the materials are generated and reclaimed within the primary mineral processing industry, the conditions of the exclusion found at § 261.4(a)(17) apply rather than this paragraph.

(2) The following materials are solid wastes, even if the recycling involves use, reuse, or return to the original process (described in paragraphs (e)(1)(i) through (iii) of this section):

(i) Materials used in a manner constituting disposal, or used to produce products that are applied to the land; or

(ii) Materials burned for energy recovery, used to produce a fuel, or contained in fuels; or

(iii) Materials accumulated speculatively; or

(iv) Materials listed in paragraphs (d)(1) and (d)(2) of this section.

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(f) *Documentation of claims that materials are not solid wastes or are conditionally exempt from regulation.* Respondents in actions to enforce regulations implementing subtitle C of RCRA who raise a claim that a certain material is not a solid waste, or is conditionally exempt from regulation, must demonstrate that there is a known market or disposition for the material, and that they meet the terms of the exclusion or exemption. In doing so, they must provide appropriate documentation (such as contracts showing that a second person uses the material as an ingredient in a production process) to demonstrate that the material is not a waste, or is exempt from regulation. In addition, owners or operators of facilities claiming that they actually are recycling materials must show that they have the necessary equipment to do so.

[50 FR 664, Jan. 4, 1985, as amended at 50 FR 33542, Aug. 20, 1985; 56 FR 7206, Feb. 21, 1991; 56 FR 32688, July 17, 1991; 56 FR 42512, Aug. 27, 1991; 57 FR 38564, Aug. 25, 1992; 59 FR 48042, Sept. 19, 1994; 62 FR 6651, Feb. 12, 1997; 62 FR 26019, May 12, 1997; 63 FR 28636, May 26, 1998; 64 FR 24513, May 11, 1999; 67 FR 11253, Mar. 13, 2002; 71 FR 40258, July 14, 2006; 73 FR 64760, Oct. 30, 2008; 75 FR 13001, Mar. 18, 2010]

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EFFECTIVE DATE NOTE: At 80 FR 1774, Jan. 13, 2015, §261.2 was amended by removing and reserving paragraph (a)(2)(ii), revising paragraph (b)(3), adding paragraph (b)(4) revising paragraph (c)(3) and table 1 in paragraph (c)(4) and adding paragraph (g), effective July 13, 2015. For the convenience of the user, the added and revised text is set forth as follows:

§261.2 Definition of solid waste.

* * * * *

(b) * * *

(3) Accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned or incinerated; or

(4) Sham recycled, as explained in paragraph (g) of this section.

* * * * *

(c) * * *

(3) *Reclaimed.* Materials noted with a “—” in column 3 of Table 1 are not solid wastes when reclaimed. Materials noted with an “*” in column 3 of Table 1 are solid wastes when reclaimed unless they meet the requirements of §§261.4(a)(17), or 261.4(a)(23), 261.4(a)(24), or 261.4(a)(27).

(4) * * *

TABLE 1

	Use constituting disposal (§ 261.2(c)(1))	Energy recovery/fuel (§ 261.2(c)(2))	Reclamation (§ 261.2(c)(3)), except as provided in §§ 261.4(a)(17), 261.4(a)(23), 261.4(a)(24) or 261.4(a)(27)	Speculative accumulation (§ 261.2(c)(4))
	1	2	3	4
Spent Materials	(*)	(*)	(*)	(*)
Sludges (listed in 40 CFR Part 261.31 or 261.32)	(*)	(*)	(*)	(*)
Sludges exhibiting a characteristic of hazardous waste	(*)	(*)	—	(*)
By-products (listed in 40 CFR 261.31 or 261.32)	(*)	(*)	(*)	(*)
By-products exhibiting a characteristic of hazardous waste	(*)	(*)	—	(*)
Commercial chemical products listed in 40 CFR 261.33	(*)	(*)	—	—
Scrap metal that is not excluded under 40 CFR 261.4(a)(13)	(*)	(*)	(*)	(*)

Note: The terms “spent materials,” “sludges,” “by-products,” and “scrap metal” and “processed scrap metal” are defined in § 261.1.

* * * * *

(g) *Sham recycling.* A hazardous secondary material found to be sham recycled is considered discarded and a solid waste. Sham recycling is recycling that is not legitimate recycling as defined in §260.43.

§261.3 Definition of hazardous waste.

(a) A solid waste, as defined in §261.2, is a hazardous waste if:

(1) It is not excluded from regulation as a hazardous waste under §261.4(b); and

(2) It meets any of the following criteria:

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(1) Transportation of the carbon dioxide stream must be in compliance with U.S. Department of Transportation requirements, including the pipeline safety laws (49 U.S.C. 60101 et seq.) and regulations (49 CFR Parts 190-199) of the U.S. Department of Transportation, and pipeline safety regulations adopted and administered by a state authority pursuant to a certification under 49 U.S.C. 60105, as applicable.

(2) Injection of the carbon dioxide stream must be in compliance with the applicable requirements for Class VI Underground Injection Control wells, including the applicable requirements in 40 CFR Parts 144 and 146.

(3) No hazardous wastes shall be mixed with, or otherwise co-injected with, the carbon dioxide stream; and

(4)(i) Any generator of a carbon dioxide stream, who claims that a carbon dioxide stream is excluded under this paragraph (h), must have an authorized representative (as defined in 40 CFR 260.10) sign a certification statement worded as follows:

I certify under penalty of law that the carbon dioxide stream that I am claiming to be excluded under 40 CFR 261.4(h) has not been mixed with hazardous wastes, and I have transported the carbon dioxide stream in compliance with (or have contracted with a pipeline operator or transporter to transport the carbon dioxide stream in compliance with) Department of Transportation requirements, including the pipeline safety laws (49 U.S.C. 60101 et seq.) and regulations (49 CFR Parts 190-199) of the U.S. Department of Transportation, and the pipeline safety regulations adopted and administered by a state authority pursuant to a certification under 49 U.S.C. 60105, as applicable, for injection into a well subject to the requirements for the Class VI Underground Injection Control Program of the Safe Drinking Water Act.

(ii) Any Class VI Underground Injection Control well owner or operator, who claims that a carbon dioxide stream is excluded under paragraph (h) of this section, must have an authorized representative (as defined in 40 CFR 260.10) sign a certification statement worded as follows:

I certify under penalty of law that the carbon dioxide stream that I am claiming to be excluded under 40 CFR 261.4(h) has not been mixed with, or otherwise co-injected with, hazardous waste at the Underground Injection Control (UIC) Class VI permitted facility, and that injection of the carbon dioxide

stream is in compliance with the applicable requirements for UIC Class VI wells, including the applicable requirements in 40 CFR Parts 144 and 146.

(iii) The signed certification statement must be kept on-site for no less than three years, and must be made available within 72 hours of a written request from the Administrator, Regional Administrator, or state Director (if located in an authorized state), or their designee. The signed certification statement must be renewed every year that the exclusion is claimed, by having an authorized representative (as defined in 40 CFR 260.10) annually prepare and sign a new copy of the certification statement within one year of the date of the previous statement. The signed certification statement must also be readily accessible on the facility's publicly-available Web site (if such Web site exists) as a public notification with the title of "Carbon Dioxide Stream Certification" at the time the exclusion is claimed.

[45 FR 33119, May 19, 1980]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 261.4, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

EFFECTIVE DATE NOTES: At 80 FR 1774, Jan. 13, 2015, § 261.4 was amended by republishing paragraph (a) introductory text, revising paragraph (a)(23) and (24), removing and reserving paragraph (a)(25) and adding paragraph (a)(27), effective July 13, 2015. For the convenience of the user, the added and revised text is set forth as follows:

§ 261.4 Exclusions.

(a) *Materials which are not solid wastes.* The following materials are not solid wastes for the purpose of this part:

* * * * *

(23) Hazardous secondary material generated and legitimately reclaimed within the United States or its territories and under the control of the generator, provided that the material complies with paragraphs (a)(23)(i) and (ii) of this section:

(i)(A) The hazardous secondary material is generated and reclaimed at the generating facility (for purposes of this definition, generating facility means all contiguous property owned, leased, or otherwise controlled by the hazardous secondary material generator); or

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(B) The hazardous secondary material is generated and reclaimed at different facilities, if the reclaiming facility is controlled by the generator or if both the generating facility and the reclaiming facility are controlled by a person as defined in §260.10 of this chapter, and if the generator provides one of the following certifications: “on behalf of [insert generator facility name], I certify that this facility will send the indicated hazardous secondary material to [insert reclaimer facility name], which is controlled by [insert generator facility name] and that [insert name of either facility] has acknowledged full responsibility for the safe management of the hazardous secondary material,” or “on behalf of [insert generator facility name], I certify that this facility will send the indicated hazardous secondary material to [insert reclaimer facility name], that both facilities are under common control, and that [insert name of either facility] has acknowledged full responsibility for the safe management of the hazardous secondary material.” For purposes of this paragraph, “control” means the power to direct the policies of the facility, whether by the ownership of stock, voting rights, or otherwise, except that contractors who operate facilities on behalf of a different person as defined in §260.10 shall not be deemed to “control” such facilities. The generating and receiving facilities must both maintain at their facilities for no less than three years records of hazardous secondary materials sent or received under this exclusion. In both cases, the records must contain the name of the transporter, the date of the shipment, and the type and quantity of the hazardous secondary material shipped or received under the exclusion. These requirements may be satisfied by routine business records (*e.g.*, financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations); or

(C) The hazardous secondary material is generated pursuant to a written contract between a tolling contractor and a toll manufacturer and is reclaimed by the tolling contractor, if the tolling contractor certifies the following: “On behalf of [insert tolling contractor name], I certify that [insert tolling contractor name] has a written contract with [insert toll manufacturer name] to manufacture [insert name of product or intermediate] which is made from specified unused materials, and that [insert tolling contractor name] will reclaim the hazardous secondary materials generated during this manufacture. On behalf of [insert tolling contractor name], I also certify that [insert tolling contractor name] retains ownership of, and responsibility for, the hazardous secondary materials that are generated during the course of the manufacture, including any releases of hazardous secondary materials that occur during the manufacturing process”.

The tolling contractor must maintain at its facility for no less than three years records of hazardous secondary materials received pursuant to its written contract with the tolling manufacturer, and the tolling manufacturer must maintain at its facility for no less than three years records of hazardous secondary materials shipped pursuant to its written contract with the tolling contractor. In both cases, the records must contain the name of the transporter, the date of the shipment, and the type and quantity of the hazardous secondary material shipped or received pursuant to the written contract. These requirements may be satisfied by routine business records (*e.g.*, financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations). For purposes of this paragraph, tolling contractor means a person who arranges for the production of a product or intermediate made from specified unused materials through a written contract with a toll manufacturer. Toll manufacturer means a person who produces a product or intermediate made from specified unused materials pursuant to a written contract with a tolling contractor.

(ii)(A) The hazardous secondary material is contained as defined in §260.10 of this chapter. A hazardous secondary material released to the environment is discarded and a solid waste unless it is immediately recovered for the purpose of reclamation. Hazardous secondary material managed in a unit with leaks or other continuing or intermittent unpermitted releases is discarded and a solid waste.

(B) The hazardous secondary material is not speculatively accumulated, as defined in §261.1(c)(8).

(C) Notice is provided as required by §260.42 of this chapter.

(D) The material is not otherwise subject to material-specific management conditions under paragraph (a) of this section when reclaimed, and it is not a spent lead-acid battery (see §266.80 and §273.2 of this chapter).

(E) Persons performing the recycling of hazardous secondary materials under this exclusion must maintain documentation of their legitimacy determination on-site. Documentation must be a written description of how the recycling meets all four factors in §260.43(a). Documentation must be maintained for three years after the recycling operation has ceased.

(F) The emergency preparedness and response requirements found in subpart M of this part are met.

(24) Hazardous secondary material that is generated and then transferred to a verified reclamation facility for the purpose of reclamation is not a solid waste, provided that:

(i) The material is not speculatively accumulated, as defined in §261.1(c)(8);

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(ii) The material is not handled by any person or facility other than the hazardous secondary material generator, the transporter, an intermediate facility or a reclaimer, and, while in transport, is not stored for more than 10 days at a transfer facility, as defined in § 260.10 of this chapter, and is packaged according to applicable Department of Transportation regulations at 49 CFR parts 173, 178, and 179 while in transport;

(iii) The material is not otherwise subject to material-specific management conditions under this paragraph (a) when reclaimed, and it is not a spent lead-acid battery (see §§ 266.80 and 273.2 of this chapter);

(iv) The reclamation of the material is legitimate, as specified under § 260.43 of this chapter;

(v) The hazardous secondary material generator satisfies all of the following conditions:

(A) The material must be contained as defined in § 260.10. A hazardous secondary material released to the environment is discarded and a solid waste unless it is immediately recovered for the purpose of recycling. Hazardous secondary material managed in a unit with leaks or other continuing releases is discarded and a solid waste.

(B) The hazardous secondary material generator must arrange for transport of hazardous secondary materials to a verified reclamation facility (or facilities) in the United States. A verified reclamation facility is a facility that has been granted a variance under § 260.31(d), or a reclamation facility where the management of the hazardous secondary materials is addressed under a RCRA Part B permit or interim status standards. If the hazardous secondary material will be passing through an intermediate facility, the intermediate facility must have been granted a variance under § 260.31(d) or the management of the hazardous secondary materials at that facility must be addressed under a RCRA Part B permit or interim status standards, and the hazardous secondary material generator must make contractual arrangements with the intermediate facility to ensure that the hazardous secondary material is sent to the reclamation facility identified by the hazardous secondary material generator.

(C) The hazardous secondary material generator must maintain at the generating facility for no less than three (3) years records of all off-site shipments of hazardous secondary materials. For each shipment, these records must, at a minimum, contain the following information:

(1) Name of the transporter and date of the shipment;

(2) Name and address of each reclaimer and, if applicable, the name and address of each intermediate facility to which the hazardous secondary material was sent;

(3) The type and quantity of hazardous secondary material in the shipment.

(D) The hazardous secondary material generator must maintain at the generating facility for no less than three (3) years confirmations of receipt from each reclaimer and, if applicable, each intermediate facility for all off-site shipments of hazardous secondary materials. Confirmations of receipt must include the name and address of the reclaimer (or intermediate facility), the type and quantity of the hazardous secondary materials received and the date which the hazardous secondary materials were received. This requirement may be satisfied by routine business records (*e.g.*, financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations of receipt);

(E) The hazardous secondary material generator must comply with the emergency preparedness and response conditions in subpart M of this part.

(vi) Reclaimers of hazardous secondary material excluded from regulation under this exclusion and intermediate facilities as defined in § 260.10 of this chapter satisfy all of the following conditions:

(A) The reclaimer and intermediate facility must maintain at its facility for no less than three (3) years records of all shipments of hazardous secondary material that were received at the facility and, if applicable, for all shipments of hazardous secondary materials that were received and subsequently sent off-site from the facility for further reclamation. For each shipment, these records must at a minimum contain the following information:

(1) Name of the transporter and date of the shipment;

(2) Name and address of the hazardous secondary material generator and, if applicable, the name and address of the reclaimer or intermediate facility which the hazardous secondary materials were received from;

(3) The type and quantity of hazardous secondary material in the shipment; and

(4) For hazardous secondary materials that, after being received by the reclaimer or intermediate facility, were subsequently transferred off-site for further reclamation, the name and address of the (subsequent) reclaimer and, if applicable, the name and address of each intermediate facility to which the hazardous secondary material was sent.

(B) The intermediate facility must send the hazardous secondary material to the reclaimer(s) designated by the hazardous secondary materials generator.

(C) The reclaimer and intermediate facility must send to the hazardous secondary material generator confirmations of receipt for all off-site shipments of hazardous secondary materials. Confirmations of receipt must include the name and address of the reclaimer

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(or intermediate facility), the type and quantity of the hazardous secondary materials received and the date which the hazardous secondary materials were received. This requirement may be satisfied by routine business records (*e.g.*, financial records, bills of lading, copies of DOT shipping papers, or electronic confirmations of receipt).

(D) The reclaimer and intermediate facility must manage the hazardous secondary material in a manner that is at least as protective as that employed for analogous raw material and must be contained. An “analogous raw material” is a raw material for which a hazardous secondary material is a substitute and serves the same function and has similar physical and chemical properties as the hazardous secondary material.

(E) Any residuals that are generated from reclamation processes will be managed in a manner that is protective of human health and the environment. If any residuals exhibit a hazardous characteristic according to subpart C of 40 CFR part 261, or if they themselves are specifically listed in subpart D of 40 CFR part 261, such residuals are hazardous wastes and must be managed in accordance with the applicable requirements of 40 CFR parts 260 through 272.

(F) The reclaimer and intermediate facility have financial assurance as required under subpart H of 40 CFR part 261.

(G) The reclaimer and intermediate facility have been granted a variance under §260.31(d) or have a RCRA Part B permit or interim status standards that address the management of the hazardous secondary materials; and

(vii) All persons claiming the exclusion under this paragraph (a)(24) of this section provide notification as required under §260.42 of this chapter.

* * * * *

(27) Hazardous secondary material that is generated and then transferred to another person for the purpose of remanufacturing is not a solid waste, provided that:

(i) The hazardous secondary material consists of one or more of the following spent solvents: Toluene, xylenes, ethylbenzene, 1,2,4-trimethylbenzene, chlorobenzene, n-hexane, cyclohexane, methyl tert-butyl ether, acetonitrile, chloroform, chloromethane, dichloromethane, methyl isobutyl ketone, NN-dimethylformamide, tetrahydrofuran, n-butyl alcohol, ethanol, and/or methanol;

(ii) The hazardous secondary material originated from using one or more of the solvents listed in paragraph (a)(27)(i) of this section in a commercial grade for reacting, extracting, purifying, or blending chemicals (or for rinsing out the process lines associated with these functions) in the pharmaceutical manufacturing (NAICS 325412), basic

organic chemical manufacturing (NAICS 325199), plastics and resins manufacturing (NAICS 325211), and/or the paints and coatings manufacturing sectors (NAICS 325510).

(iii) The hazardous secondary material generator sends the hazardous secondary material spent solvents listed in paragraph (a)(27)(i) of this section to a remanufacturer in the pharmaceutical manufacturing (NAICS 325412), basic organic chemical manufacturing (NAICS 325199), plastics and resins manufacturing (NAICS 325211), and/or the paints and coatings manufacturing sectors (NAICS 325510).

(iv) After remanufacturing one or more of the solvents listed in paragraph (a)(27)(i) of this section, the use of the remanufactured solvent shall be limited to reacting, extracting, purifying, or blending chemicals (or for rinsing out the process lines associated with these functions) in the pharmaceutical manufacturing (NAICS 325412), basic organic chemical manufacturing (NAICS 325199), plastics and resins manufacturing (NAICS 325211), and the paints and coatings manufacturing sectors (NAICS 325510) or to using them as ingredients in a product. These allowed uses correspond to chemical functional uses enumerated under the Chemical Data Reporting Rule of the Toxic Substances Control Act (40 CFR parts 704, 710–711), including Industrial Function Codes U015 (solvents consumed in a reaction to produce other chemicals) and U030 (solvents become part of the mixture);

(v) After remanufacturing one or more of the solvents listed in paragraph (a)(27)(i) of this section, the use of the remanufactured solvent does not involve cleaning or degreasing oil, grease, or similar material from textiles, glassware, metal surfaces, or other articles. (These disallowed continuing uses correspond to chemical functional uses in Industrial Function Code U029 under the Chemical Data Reporting Rule of the Toxic Substances Control Act.); and

(vi) Both the hazardous secondary material generator and the remanufacturer must:

(A) Notify EPA or the State Director, if the state is authorized for the program, and update the notification every two years per 40 CFR 260.42;

(B) Develop and maintain an up-to-date remanufacturing plan which identifies:

(1) The name, address and EPA ID number of the generator(s) and the remanufacturer(s),

(2) The types and estimated annual volumes of spent solvents to be remanufactured,

(3) The processes and industry sectors that generate the spent solvents,

(4) The specific uses and industry sectors for the remanufactured solvents, and

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(5) A certification from the remanufacturer stating "on behalf of [insert remanufacturer facility name], I certify that this facility is a remanufacturer under pharmaceutical manufacturing (NAICS 325412), basic organic chemical manufacturing (NAICS 325199), plastics and resins manufacturing (NAICS 325211), and/or the paints and coatings manufacturing sectors (NAICS 325510), and will accept the spent solvent(s) for the sole purpose of remanufacturing into commercial-grade solvent(s) that will be used for reacting, extracting, purifying, or blending chemicals (or for rinsing out the process lines associated with these functions) or for use as product ingredient(s). I also certify that the remanufacturing equipment, vents, and tanks are equipped with and are operating air emission controls in compliance with the appropriate Clean Air Act regulations under 40 CFR part 60, part 61 or part 63, or, absent such Clean Air Act standards for the particular operation or piece of equipment covered by the remanufacturing exclusion, are in compliance with the appropriate standards in 40 CFR part 261, subparts AA (vents), BB (equipment) and CC (tank storage).";

(C) Maintain records of shipments and confirmations of receipts for a period of three years from the dates of the shipments;

(D) Prior to remanufacturing, store the hazardous spent solvents in tanks or containers that meet technical standards found in subparts I and J of 40 CFR part 261, with the tanks and containers being labeled or otherwise having an immediately available record of the material being stored;

(E) During remanufacturing, and during storage of the hazardous secondary materials prior to remanufacturing, the remanufacturer certifies that the remanufacturing equipment, vents, and tanks are equipped with and are operating air emission controls in compliance with the appropriate Clean Air Act regulations under 40 CFR part 60, part 61 or part 63; or, absent such Clean Air Act standards for the particular operation or piece of equipment covered by the remanufacturing exclusion, are in compliance with the appropriate standards in 40 CFR part 261 subparts AA (vents), BB (equipment) and CC (tank storage); and

(F) Meet the requirements prohibiting speculative accumulation per 40 CFR 261.1(c)(8).

2. At 80 FR 21500, Apr. 17, 2015, §261.4 was amended by revising paragraph (b)(4), effective Oct. 14, 2015, the revised text is set forth to read as follows:

§261.4 Exclusions.

* * * * *

(b) * * *

(4)(i) Fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels, except as provided by §266.112 of this chapter for facilities that burn or process hazardous waste.

(ii) The following wastes generated primarily from processes that support the combustion of coal or other fossil fuels that are co-disposed with the wastes in paragraph (b)(4)(i) of this section, except as provided by §266.112 of this chapter for facilities that burn or process hazardous waste:

(A) *Coal pile run-off.* For purposes of paragraph (b)(4) of this section, coal pile run-off means any precipitation that drains off coal piles.

(B) *Boiler cleaning solutions.* For purposes of paragraph (b)(4) of this section, boiler cleaning solutions means water solutions and chemical solutions used to clean the fire-side and water-side of the boiler.

(C) *Boiler blowdown.* For purposes of paragraph (b)(4) of this section, boiler blowdown means water purged from boilers used to generate steam.

(D) *Process water treatment and demineralizer regeneration wastes.* For purposes of paragraph (b)(4) of this section, process water treatment and demineralizer regeneration wastes means sludges, rinses, and spent resins generated from processes to remove dissolved gases, suspended solids, and dissolved chemical salts from combustion system process water.

(E) *Cooling tower blowdown.* For purposes of paragraph (b)(4) of this section, cooling tower blowdown means water purged from a closed cycle cooling system. Closed cycle cooling systems include cooling towers, cooling ponds, or spray canals.

(F) *Air heater and precipitator washes.* For purposes of paragraph (b)(4) of this section, air heater and precipitator washes means wastes from cleaning air preheaters and electrostatic precipitators.

(G) *Effluents from floor and yard drains and sumps.* For purposes of paragraph (b)(4) of this section, effluents from floor and yard drains and sumps means wastewaters, such as wash water, collected by or from floor drains, equipment drains, and sumps located inside the power plant building; and wastewaters, such as rain runoff, collected by yard drains and sumps located outside the power plant building.

(H) *Wastewater treatment sludges.* For purposes of paragraph (b)(4) of this section, wastewater treatment sludges refers to sludges generated from the treatment of wastewaters specified in paragraphs (b)(4)(ii)(A) through (F) of this section.

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the wastes are nonhazardous. The generator can then use knowledge of the wastes to support subsequent annual determinations.

(B) The annual testing requirements are reinstated if the manufacturing or waste treatment processes generating the wastes are significantly altered, resulting in an increase of the potential for the wastes to exceed the listing levels.

(C) If the annual testing requirements are suspended, the generator must keep records of the process knowledge information used to support a nonhazardous determination. If testing is reinstated, a description of the process change must be retained.

(4) *Recordkeeping for the landfill disposal and combustion exemptions.* For the purposes of meeting the landfill disposal and combustion condition set out in the K181 listing description, the generator must maintain on site for three years documentation demonstrating that each shipment of waste was received by a landfill unit that is subject to or meets the landfill design standards set out in the listing description, or was treated in combustion units as specified in the listing description.

(5) *Waste holding and handling.* During the interim period, from the point of generation to completion of the hazardous waste determination, the generator is responsible for storing the wastes appropriately. If the wastes are determined to be hazardous and the generator has not complied with the subtitle C requirements during the interim period, the generator could be subject to an enforcement action for improper management.

[46 FR 4918, Jan. 16, 1981]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §261.33, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

§261.33 Discarded commercial chemical products, off-specification species, container residues, and spill residues thereof.

The following materials or items are hazardous wastes if and when they are discarded or intended to be discarded as described in §261.2(a)(2)(i), when

they are mixed with waste oil or used oil or other material and applied to the land for dust suppression or road treatment, when they are otherwise applied to the land in lieu of their original intended use or when they are contained in products that are applied to the land in lieu of their original intended use, or when, in lieu of their original intended use, they are produced for use as (or as a component of) a fuel, distributed for use as a fuel, or burned as a fuel.

(a) Any commercial chemical product, or manufacturing chemical intermediate having the generic name listed in paragraph (e) or (f) of this section.

(b) Any off-specification commercial chemical product or manufacturing chemical intermediate which, if it met specifications, would have the generic name listed in paragraph (e) or (f) of this section.

(c) Any residue remaining in a container or in an inner liner removed from a container that has held any commercial chemical product or manufacturing chemical intermediate having the generic name listed in paragraphs (e) or (f) of this section, unless the container is empty as defined in §261.7(b) of this chapter.

[Comment: Unless the residue is being beneficially used or reused, or legitimately recycled or reclaimed; or being accumulated, stored, transported or treated prior to such use, re-use, recycling or reclamation, EPA considers the residue to be intended for discard, and thus, a hazardous waste. An example of a legitimate re-use of the residue would be where the residue remains in the container and the container is used to hold the same commercial chemical product or manufacturing chemical intermediate it previously held. An example of the discard of the residue would be where the drum is sent to a drum reconditioner who reconditions the drum but discards the residue.]

(d) Any residue or contaminated soil, water or other debris resulting from the cleanup of a spill into or on any land or water of any commercial chemical product or manufacturing chemical intermediate having the generic name listed in paragraph (e) or (f) of this section, or any residue or contaminated soil, water or other debris resulting from the cleanup of a spill, into or on any land or water, of any off-specification chemical product and manufacturing chemical intermediate

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which, if it met specifications, would have the generic name listed in paragraph (e) or (f) of this section.

[*Comment:* The phrase “commercial chemical product or manufacturing chemical intermediate having the generic name listed in . . .” refers to a chemical substance which is manufactured or formulated for commercial or manufacturing use which consists of the commercially pure grade of the chemical, any technical grades of the chemical that are produced or marketed, and all formulations in which the chemical is the sole active ingredient. It does not refer to a material, such as a manufacturing process waste, that contains any of the substances listed in paragraph (e) or (f). Where a manufacturing process waste is deemed to be a hazardous waste because it contains a substance listed in paragraph (e) or (f), such waste will be listed in either §261.31 or §261.32 or will be identified as a hazardous waste by the characteristics set forth in subpart C of this part.]

(e) The commercial chemical products, manufacturing chemical intermediates or off-specification commercial chemical products or manufacturing chemical intermediates referred to in paragraphs (a) through (d) of this section, are identified as acute hazardous wastes (H) and are subject to the small quantity exclusion defined in §261.5(e).

[*Comment:* For the convenience of the regulated community the primary hazardous properties of these materials have been indicated by the letters T (Toxicity), and R (Reactivity). Absence of a letter indicates that the compound only is listed for acute toxicity. Wastes are first listed in alphabetical order by substance and then listed again in numerical order by Hazardous Waste Number.]

These wastes and their corresponding EPA Hazardous Waste Numbers are:

Hazardous waste No.	Chemical abstracts No.	Substance
P023	107-20-0	Acetaldehyde, chloro-
P002	591-08-2	Acetamide, N-(aminothioxomethyl)-
P057	640-19-7	Acetamide, 2-fluoro-
P058	62-74-8	Acetic acid, fluoro-, sodium salt
P002	591-08-2	1-Acetyl-2-thiourea
P003	107-02-8	Acrolein
P070	116-06-3	Aldicarb
P203	1646-88-4	Aldicarb sulfone.
P004	309-00-2	Aldrin
P005	107-18-6	Allyl alcohol
P006	20859-73-8	Aluminum phosphide (R,T)
P007	2763-96-4	5-(Aminomethyl)-3-isoxazolol
P008	504-24-5	4-Aminopyridine
P009	131-74-8	Ammonium picrate (R)
P119	7803-55-6	Ammonium vanadate
P099	506-61-6	Argentate(1-), bis(cyano-C)-, potassium
P010	7778-39-4	Arsenic acid H ₃ AsO ₄
P012	1327-53-3	Arsenic oxide As ₂ O ₃
P011	1303-28-2	Arsenic oxide As ₂ O ₅
P011	1303-28-2	Arsenic pentoxide
P012	1327-53-3	Arsenic trioxide
P038	692-42-2	Arsine, diethyl-
P036	696-28-6	Arsonous dichloride, phenyl-
P054	151-56-4	Aziridine
P067	75-55-8	Aziridine, 2-methyl-
P013	542-62-1	Barium cyanide
P024	106-47-8	Benzenamine, 4-chloro-
P077	100-01-6	Benzenamine, 4-nitro-
P028	100-44-7	Benzene, (chloromethyl)-
P042	51-43-4	1,2-Benzenediol, 4-[1-hydroxy-2-(methylamino)ethyl]-, (R)-
P046	122-09-8	Benzeneethanamine, alpha, alpha-dimethyl-
P014	108-98-5	Benzenethiol
P127	1563-66-2	7-Benzofuranol, 2,3-dihydro-2,2-dimethyl-, methylcarbamate.
P188	57-64-7	Benzoic acid, 2-hydroxy-, compd. with (3aS-cis)-1,2,3,3a,8,8a-hexahydro-1,3a,8-trimethylpyrrolo[2,3-b]indol-5-yl methylcarbamate ester (1:1).
P001	181-81-2	2H-1-Benzopyran-2-one, 4-hydroxy-3-(3-oxo-1-phenylbutyl)-, & salts, when present at concentrations greater than 0.3%
P028	100-44-7	Benzyl chloride
P015	7440-41-7	Beryllium powder
P017	598-31-2	Bromoacetone
P018	357-57-3	Brucine
P045	39196-18-4	2-Butanone, 3,3-dimethyl-1-(methylthio)-, O-[(methylamino)carbonyl] oxime

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The remanufacturer or other person that stores or treats the hazardous secondary material shall manage all hazardous secondary material placed in a tank in accordance with the applicable requirements of subparts AA, BB, and CC of this part.

Subparts K–L [Reserved]

EFFECTIVE DATE NOTE: At 80 FR 1777, Jan. 13, 2015, Subparts K–L were added and reserved, effective July 13, 2015.

Subpart M—Emergency Preparedness and Response for Management of Excluded Hazardous Secondary Materials

SOURCE: 80 FR 1777, Jan. 13, 2015, unless otherwise noted.

EFFECTIVE DATE NOTE: At 80 FR 1777, Jan. 13, 2015, Subpart M was added, effective July 13, 2015.

§261.400 Applicability.

The requirements of this subpart apply to those areas of an entity managing hazardous secondary materials excluded under §261.4(a)(23) and/or (24) where hazardous secondary materials are generated or accumulated on site.

(a) A generator of hazardous secondary material, or an intermediate or reclamation facility operating under a verified recycler variance under §260.31(d), that accumulates 6000 kg or less of hazardous secondary material at any time must comply with §§261.410 and 261.411.

(b) A generator of hazardous secondary material, or an intermediate or reclamation facility operating under a verified recycler variance under §260.31(d) that accumulates more than 6000 kg of hazardous secondary material at any time must comply with §§261.410 and 261.420.

§261.410 Preparedness and prevention.

(a) *Maintenance and operation of facility.* Facilities generating or accumulating hazardous secondary material must be maintained and operated to minimize the possibility of a fire, explosion, or any unplanned sudden or

non-sudden release of hazardous secondary materials or hazardous secondary material constituents to air, soil, or surface water which could threaten human health or the environment.

(b) *Required equipment.* All facilities generating or accumulating hazardous secondary material must be equipped with the following, *unless* none of the hazards posed by hazardous secondary material handled at the facility could require a particular kind of equipment specified below:

(1) An internal communications or alarm system capable of providing immediate emergency instruction (voice or signal) to facility personnel;

(2) A device, such as a telephone (immediately available at the scene of operations) or a hand-held two-way radio, capable of summoning emergency assistance from local police departments, fire departments, or state or local emergency response teams;

(3) Portable fire extinguishers, fire control equipment (including special extinguishing equipment, such as that using foam, inert gas, or dry chemicals), spill control equipment, and decontamination equipment; and

(4) Water at adequate volume and pressure to supply water hose streams, or foam producing equipment, or automatic sprinklers, or water spray systems.

(c) *Testing and maintenance of equipment.* All facility communications or alarm systems, fire protection equipment, spill control equipment, and decontamination equipment, where required, must be tested and maintained as necessary to assure its proper operation in time of emergency.

(d) *Access to communications or alarm system.* (1) Whenever hazardous secondary material is being poured, mixed, spread, or otherwise handled, all personnel involved in the operation must have immediate access to an internal alarm or emergency communication device, either directly or through visual or voice contact with another employee, unless such a device is not required under paragraph (b) of this section.

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(2) If there is ever just one employee on the premises while the facility is operating, he must have immediate access to a device, such as a telephone (immediately available at the scene of operation) or a hand-held two-way radio, capable of summoning external emergency assistance, *unless* such a device is not required under paragraph (b) of this section.

(e) *Required aisle space.* The hazardous secondary material generator or intermediate or reclamation facility operating under a verified recycler variance under §260.31(d) must maintain aisle space to allow the unobstructed movement of personnel, fire protection equipment, spill control equipment, and decontamination equipment to any area of facility operation in an emergency, unless aisle space is not needed for any of these purposes.

(f) *Arrangements with local authorities.*

(1) The hazardous secondary material generator or an intermediate or reclamation facility operating under a verified recycler variance under §260.31(d) must attempt to make the following arrangements, as appropriate for the type of waste handled at his facility and the potential need for the services of these organizations:

(i) Arrangements to familiarize police, fire departments, and emergency response teams with the layout of the facility, properties of hazardous secondary material handled at the facility and associated hazards, places where facility personnel would normally be working, entrances to roads inside the facility, and possible evacuation routes;

(ii) Where more than one police and fire department might respond to an emergency, agreements designating primary emergency authority to a specific police and a specific fire department, and agreements with any others to provide support to the primary emergency authority;

(iii) Agreements with state emergency response teams, emergency response contractors, and equipment suppliers; and

(iv) Arrangements to familiarize local hospitals with the properties of hazardous waste handled at the facility and the types of injuries or illnesses

which could result from fires, explosions, or releases at the facility.

(2) Where state or local authorities decline to enter into such arrangements, the hazardous secondary material generator or an intermediate or reclamation facility operating under a verified recycler variance under §260.31(d) must document the refusal in the operating record.

§261.411 Emergency procedures for facilities generating or accumulating 6000 kg or less of hazardous secondary material.

A generator or an intermediate or reclamation facility operating under a verified recycler variance under §260.31(d) that generates or accumulates 6000 kg or less of hazardous secondary material must comply with the following requirements:

(a) At all times there must be at least one employee either on the premises or on call (*i.e.*, available to respond to an emergency by reaching the facility within a short period of time) with the responsibility for coordinating all emergency response measures specified in paragraph (d) of this section. This employee is the emergency coordinator.

(b) The generator or intermediate or reclamation facility operating under a verified recycler variance under §260.31(d) must post the following information next to the telephone:

(1) The name and telephone number of the emergency coordinator;

(2) Location of fire extinguishers and spill control material, and, if present, fire alarm; and

(3) The telephone number of the fire department, unless the facility has a direct alarm.

(c) The generator or an intermediate or reclamation facility operating under a verified recycler variance under §260.31(d) must ensure that all employees are thoroughly familiar with proper waste handling and emergency procedures, relevant to their responsibilities during normal facility operations and emergencies;

(d) The emergency coordinator or his designee must respond to any emergencies that arise. The applicable responses are as follows:

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(1) In the event of a fire, call the fire department or attempt to extinguish it using a fire extinguisher;

(2) In the event of a spill, contain the flow of hazardous waste to the extent possible, and as soon as is practicable, clean up the hazardous waste and any contaminated materials or soil;

(3) In the event of a fire, explosion, or other release which could threaten human health outside the facility or when the generator or an intermediate or reclamation facility operating under a verified recycler variance under §260.31(d) has knowledge that a spill has reached surface water, the generator or an intermediate or reclamation facility operating under a verified recycler variance under §260.31(d) must immediately notify the National Response Center (using their 24-hour toll free number 800/424-8802). The report must include the following information:

(i) The name, address, and U.S. EPA Identification Number of the facility;

(ii) Date, time, and type of incident (e.g., spill or fire);

(iii) Quantity and type of hazardous waste involved in the incident;

(iv) Extent of injuries, if any; and

(v) Estimated quantity and disposition of recovered materials, if any.

§261.420 Contingency planning and emergency procedures for facilities generating or accumulating more than 6000 kg of hazardous secondary material.

A generator or an intermediate or reclamation facility operating under a verified recycler variance under §260.31(d) that generates or accumulates more than 6000 kg of hazardous secondary material must comply with the following requirements:

(a) *Purpose and implementation of contingency plan.* (1) Each generator or an intermediate or reclamation facility operating under a verified recycler variance under §260.31(d) that accumulates more than 6000 kg of hazardous secondary material must have a contingency plan for his facility. The contingency plan must be designed to minimize hazards to human health or the environment from fires, explosions, or any unplanned sudden or non-sudden release of hazardous secondary material or hazardous secondary material

constituents to air, soil, or surface water.

(2) The provisions of the plan must be carried out immediately whenever there is a fire, explosion, or release of hazardous secondary material or hazardous secondary material constituents which could threaten human health or the environment.

(b) *Content of contingency plan.* (1) The contingency plan must describe the actions facility personnel must take to comply with paragraphs (a) and (f) in response to fires, explosions, or any unplanned sudden or non-sudden release of hazardous secondary material or hazardous secondary material constituents to air, soil, or surface water at the facility.

(2) If the generator or an intermediate or reclamation facility operating under a verified recycler variance under §260.31(d) accumulating more than 6000 kg of hazardous secondary material has already prepared a Spill Prevention, Control, and Countermeasures (SPCC) Plan in accordance with part 112 of this chapter, or some other emergency or contingency plan, he need only amend that plan to incorporate hazardous waste management provisions that are sufficient to comply with the requirements of this part. The hazardous secondary material generator or an intermediate or reclamation facility operating under a verified recycler variance under §260.31(d) may develop one contingency plan which meets all regulatory requirements. EPA recommends that the plan be based on the National Response Team's Integrated Contingency Plan Guidance ("One Plan"). When modifications are made to non-RCRA provisions in an integrated contingency plan, the changes do not trigger the need for a RCRA permit modification.

(3) The plan must describe arrangements agreed to by local police departments, fire departments, hospitals, contractors, and State and local emergency response teams to coordinate emergency services, pursuant to §262.410(f).

(4) The plan must list names, addresses, and phone numbers (office and home) of all persons qualified to act as emergency coordinator (see paragraph (e) of this section), and this list must

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be kept up-to-date. Where more than one person is listed, one must be named as primary emergency coordinator and others must be listed in the order in which they will assume responsibility as alternates.

(5) The plan must include a list of all emergency equipment at the facility (such as fire extinguishing systems, spill control equipment, communications and alarm systems (internal and external), and decontamination equipment), where this equipment is required. This list must be kept up to date. In addition, the plan must include the location and a physical description of each item on the list, and a brief outline of its capabilities.

(6) The plan must include an evacuation plan for facility personnel where there is a possibility that evacuation could be necessary. This plan must describe signal(s) to be used to begin evacuation, evacuation routes, and alternate evacuation routes (in cases where the primary routes could be blocked by releases of hazardous waste or fires).

(c) *Copies of contingency plan.* A copy of the contingency plan and all revisions to the plan must be:

- (1) Maintained at the facility; and
- (2) Submitted to all local police departments, fire departments, hospitals, and State and local emergency response teams that may be called upon to provide emergency services.

(d) *Amendment of contingency plan.* The contingency plan must be reviewed, and immediately amended, if necessary, whenever:

- (1) Applicable regulations are revised;
- (2) The plan fails in an emergency;
- (3) The facility changes—in its design, construction, operation, maintenance, or other circumstances—in a way that materially increases the potential for fires, explosions, or releases of hazardous secondary material or hazardous secondary material constituents, or changes the response necessary in an emergency;
- (4) The list of emergency coordinators changes; or
- (5) The list of emergency equipment changes.

(e) *Emergency coordinator.* At all times, there must be at least one em-

ployee either on the facility premises or on call (*i.e.*, available to respond to an emergency by reaching the facility within a short period of time) with the responsibility for coordinating all emergency response measures. This emergency coordinator must be thoroughly familiar with all aspects of the facility's contingency plan, all operations and activities at the facility, the location and characteristics of waste handled, the location of all records within the facility, and the facility layout. In addition, this person must have the authority to commit the resources needed to carry out the contingency plan. The emergency coordinator's responsibilities are more fully spelled out in paragraph (f). Applicable responsibilities for the emergency coordinator vary, depending on factors such as type and variety of hazardous secondary material(s) handled by the facility, and type and complexity of the facility.

(f) *Emergency procedures.* (1) Whenever there is an imminent or actual emergency situation, the emergency coordinator (or his designee when the emergency coordinator is on call) must immediately:

- (i) Activate internal facility alarms or communication systems, where applicable, to notify all facility personnel; and
- (ii) Notify appropriate State or local agencies with designated response roles if their help is needed.

(2) Whenever there is a release, fire, or explosion, the emergency coordinator must immediately identify the character, exact source, amount, and areal extent of any released materials. He may do this by observation or review of facility records or manifests and, if necessary, by chemical analysis.

(3) Concurrently, the emergency coordinator must assess possible hazards to human health or the environment that may result from the release, fire, or explosion. This assessment must consider both direct and indirect effects of the release, fire, or explosion (*e.g.*, the effects of any toxic, irritating, or asphyxiating gases that are generated, or the effects of any hazardous surface water run-offs from water or chemical agents used to control fire and heat-induced explosions).

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(4) If the emergency coordinator determines that the facility has had a release, fire, or explosion which could threaten human health, or the environment, outside the facility, he must report his findings as follows:

(i) If his assessment indicates that evacuation of local areas may be advisable, he must immediately notify appropriate local authorities. He must be available to help appropriate officials decide whether local areas should be evacuated; and

(ii) He must immediately notify either the government official designated as the on-scene coordinator for that geographical area, or the National Response Center (using their 24-hour toll free number 800/424-8802). The report must include:

(A) Name and telephone number of reporter;

(B) Name and address of facility;

(C) Time and type of incident (*e.g.*, release, fire);

(D) Name and quantity of material(s) involved, to the extent known;

(E) The extent of injuries, if any; and

(F) The possible hazards to human health, or the environment, outside the facility.

(5) During an emergency, the emergency coordinator must take all reasonable measures necessary to ensure that fires, explosions, and releases do not occur, recur, or spread to other hazardous secondary material at the facility. These measures must include, where applicable, stopping processes and operations, collecting and containing released material, and removing or isolating containers.

(6) If the facility stops operations in response to a fire, explosion or release, the emergency coordinator must monitor for leaks, pressure buildup, gas generation, or ruptures in valves, pipes, or other equipment, wherever this is appropriate.

(7) Immediately after an emergency, the emergency coordinator must provide for treating, storing, or disposing of recovered secondary material, contaminated soil or surface water, or any other material that results from a release, fire, or explosion at the facility. Unless the hazardous secondary material generator can demonstrate, in accordance with §261.3(c) or (d) of this

chapter, that the recovered material is not a hazardous waste, the owner or operator becomes a generator of hazardous waste and must manage it in accordance with all applicable requirements of parts 262, 263, and 265 of this chapter.

(8) The emergency coordinator must ensure that, in the affected area(s) of the facility:

(i) No secondary material that may be incompatible with the released material is treated, stored, or disposed of until cleanup procedures are completed; and

(ii) All emergency equipment listed in the contingency plan is cleaned and fit for its intended use before operations are resumed.

(9) The hazardous secondary material generator must note in the operating record the time, date, and details of any incident that requires implementing the contingency plan. Within 15 days after the incident, he must submit a written report on the incident to the Regional Administrator. The report must include:

(i) Name, address, and telephone number of the hazardous secondary material generator;

(ii) Name, address, and telephone number of the facility;

(iii) Date, time, and type of incident (*e.g.*, fire, explosion);

(iv) Name and quantity of material(s) involved;

(v) The extent of injuries, if any;

(vi) An assessment of actual or potential hazards to human health or the environment, where this is applicable; and

(vii) Estimated quantity and disposition of recovered material that resulted from the incident.

Subparts N-Z [Reserved]

EFFECTIVE DATE NOTE: At 80 FR 1777, Jan. 13, 2015, Subparts N-Z were added and reserved, effective July 13, 2015.

Subpart AA—Air Emission Standards for Process Vents

SOURCE: 80 FR 1777, Jan. 13, 2015, unless otherwise noted.

§279.11

(5) Used oil that is incidentally captured by a hydrocarbon recovery system or wastewater treatment system as part of routine process operations at a petroleum refining facility and inserted into the petroleum refining facility process is exempt from the requirements of this part. This exemption does not extend to used oil which is intentionally introduced into a hydrocarbon recovery system (e.g., by pouring collected used oil into the waste water treatment system).

(6) Tank bottoms from stock tanks containing exempt mixtures of used oil and crude oil or natural gas liquids are exempt from the requirements of this part.

(h) *Used oil on vessels.* Used oil produced on vessels from normal shipboard operations is not subject to this part until it is transported ashore.

(i) *Used oil containing PCBs.* Used oil containing PCBs (as defined at 40 CFR 761.3) at any concentration less than 50 ppm is subject to the requirements of this part unless, because of dilution, it is regulated under 40 CFR part 761 as a used oil containing PCBs at 50 ppm or greater. PCB-containing used oil subject to the requirements of this part may also be subject to the prohibitions and requirements found at 40 CFR part 761, including §761.20(d) and (e). Used oil containing PCBs at concentrations of 50 ppm or greater is not subject to the requirements of this part, but is subject to regulation under 40 CFR part 761. No person may avoid these provisions by diluting used oil containing PCBs, unless otherwise specifically provided for in this part or part 761 of this chapter.

[57 FR 41612, Sept. 10, 1992, as amended at 58 FR 26425, May 3, 1993; 59 FR 10559, Mar. 4, 1994; 59 FR 10553, Mar. 4, 1994; 61 FR 23093, June 28, 1996; 63 FR 24009, May 6, 1998; 63 FR 27762, July 14, 1998; 69 FR 44605, July 30, 2004; 70 FR 24591, June 14, 2005; 71 FR 46260, July 14, 2006]

§279.11 Used oil specifications.

Used oil burned for energy recovery, and any fuel produced from used oil by processing, blending, or other treatment, is subject to regulation under this part unless it is shown not to exceed any of the allowable levels of the constituents and properties shown in

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Table 1. Once used oil that is to be burned for energy recovery has been shown not to exceed any allowable level and the person making that showing complies with §§279.72, 279.73, and 279.74(b), the used oil is no longer subject to this part.

TABLE 1— USED OIL NOT EXCEEDING ANY ALLOWABLE LEVEL SHOWN BELOW IS NOT SUBJECT TO THIS PART WHEN BURNED FOR ENERGY RECOVERY¹

Constituent/property	Allowable level
Arsenic	5 ppm maximum.
Cadmium	2 ppm maximum.
Chromium	10 ppm maximum.
Lead	100 ppm maximum.
Flash point	100 °F minimum.
Total halogens	4,000 ppm maximum. ²
NOTE: Applicable standards for the burning of used oil containing PCBs are imposed by 40 CFR 761.20(e).	

¹The allowable levels do not apply to mixtures of used oil and hazardous waste that continue to be regulated as hazardous waste (see §279.10(b)).

²Used oil containing more than 1,000 ppm total halogens is presumed to be a hazardous waste under the rebuttable presumption provided under §279.10(b)(1). Such used oil is subject to subpart H of part 266 of this chapter rather than this part when burned for energy recovery unless the presumption of mixing can be successfully rebutted.

[57 FR 41612, Sept. 10, 1992, as amended at 58 FR 26425, May 3, 1993; 71 FR 40280, July 14, 2006]

§279.12 Prohibitions.

(a) *Surface impoundment prohibition.* Used oil shall not be managed in surface impoundments or waste piles unless the units are subject to regulation under parts 264 or 265 of this chapter.

(b) *Use as a dust suppressant.* The use of used oil as a dust suppressant is prohibited, except when such activity takes place in one of the states listed in §279.52(c).

(c) *Burning in particular units.* Off-specification used oil fuel may be burned for energy recovery in only the following devices:

(1) Industrial furnaces identified in §260.10 of this chapter;

(2) Boilers, as defined in §260.10 of this chapter, that are identified as follows:

(i) Industrial boilers located on the site of a facility engaged in a manufacturing process where substances are

No. 09-1038
(and consolidated cases Nos. 15-1083, 15-1085, 15-1088, 15-1089, and 15-1094)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

AMERICAN PETROLEUM INSTITUTE, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

ON PETITION FOR REVIEW OF FINAL REGULATIONS PROMULGATED
BY THE ENVIRONMENTAL PROTECTION AGENCY

ADDENDUM 2:

**ADDITIONAL EVIDENCE OF STANDING FOR PETITIONERS
AMERICAN PETROLEUM INSTITUTE
AND
FREEPORT-MCMORAN INC.**

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**IN THE UNITED STATES COURT OF APPEALS
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v.)	No. 09-1038 (and
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UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY, <i>et al.</i> ,)	
)	
Respondents.)	
)	

DECLARATION OF MARK DEESE

I, Mark Deese, declare the following:

1. I am employed by Phillips 66 Company in the capacity of Senior Consultant for Waste and Water. In that capacity I am responsible for providing regulatory guidance for waste management at our refineries, terminals, lube oil plants, and other business units as requested. I am responsible to read all EPA proposed and final waste rules, provide comments as necessary, and assess impact on our business units. I have personal knowledge of the matters stated herein.

2. My qualifications include a MS in Engineering Management from Oklahoma State University, 25 years' experience in the petroleum industry, and over 30 years' experience in the environmental field. Besides my education and annual RCRA refresher courses, I spent eight years leading the waste management

team at Phillip 66's Sweeny Refinery, providing regulatory guidance and waste management oversight. I am familiar with the definition of solid waste in 40 C.F.R. Part 261, as amended by the rules at issue in this case (73 Fed. Reg. 64668 (Oct. 30, 2008) and 80 Fed. Reg. 1694 (Jan. 13, 2015)). I am also familiar with the regulations that currently apply to spent hydrotreating and hydrorefining catalysts in 40 C.F.R. Parts 261 through 265.

3. As explained below, Phillips 66 Company is directly affected by the rules at issue in this case.

4. Phillips 66 Company owns several petroleum refineries such as the Bayway Refinery in Linden, NJ and Sweeny Refinery in Old Ocean, TX. Periodically, these refineries generate spent hydrotreating and hydrorefining catalysts. Those spent catalysts currently are listed in 40 C.F.R. Part 261 as hazardous wastes K171 and K172, respectively.

5. Our refineries usually send their spent catalysts to an off-site facility owned by a third party, where valuable metals are recovered from the catalysts. Currently, we send those spent catalysts to Gulf Chemical and Metallurgical Company (GCMC) in Freeport, TX and Clean Harbors' Duratherm facility in San Leon, TX. It is my understanding that both GCMC and Duratherm are permitted under Subtitle C of the Resource Conservation and Recovery Act ("RCRA") to store hazardous waste.

6. In the 2008 rule, EPA refused to exclude recycled catalysts from the definition of “solid waste.” In the 2015 rule, EPA allowed the catalysts to be excluded from the definition of “solid waste,” but only if the catalysts met certain regulatory requirements (*e.g.*, transfer to a RCRA-permitted facility or a facility that applies for and obtains a variance as a “verified reclamation facility,” and compliance with extensive, prescribed emergency preparedness and response requirements). EPA’s continued assertion of RCRA regulatory authority over recycled catalysts in the rules at issue imposes costs upon Phillips 66’s refineries that would not exist (or would be lower) if the catalysts were unconditionally excluded from the definition of “solid waste” or if their exclusion from the definition of “solid waste” were subject to fewer regulatory conditions or requirements.

7. If the spent catalysts were excluded from the regulatory definition of “solid waste” unconditionally, the overall costs to our refineries for handling the spent catalysts would likely be reduced because the catalysts would not be considered hazardous wastes and the regulatory burden upon the catalysts would be less.

8. For example, transporters tend to charge more to transport materials when those materials are considered hazardous wastes under RCRA than they do when those materials are not considered hazardous wastes under RCRA. Also, I

anticipate that because reclamation facilities would no longer be required to undergo the lengthy and costly process of obtaining a RCRA Subtitle C permit in order to handle the spent catalysts, new entities would likely enter the reclamation market, thereby increasing competition and placing downward pressure on recycling costs.

9. The “verified recycler exclusion” in the 2015 rule allows the catalysts to be excluded from the definition of “solid waste,” but only upon compliance with very costly regulatory requirements that render the benefits of the exclusion illusory. For example, the catalysts must still be sent to a RCRA-permitted facility or else to a facility that has gone through a similar, alternative process of pre-approval as a “verified reclamation facility.” These requirements continue to burden the recycling markets in which our refineries participate. I anticipate overall recycling costs would be lower if neither of these specific permitting requirements existed, because more facilities could enter the market and do so at lower cost. Also, the more entities that enter the market, the more likely some entities would open operations closer to many of our refineries than the limited existing operations are located, thereby reducing the transportation costs.


10. Additionally, while our refineries already employ emergency preparedness and response measures, compliance with the highly specific requirements in the verified recycler exclusion would increase compliance costs.

11. Our refineries are also directly affected by EPA's evident interpretation in the 2015 Response To Comments that off-specification products can be considered "secondary materials." Like all refineries, we occasionally produce fuels that are off-specification, and which are reprocessed on-site in normal refinery processes so as to meet specifications. However, off-specification fuels could be sold to re-refiners, like Intergulf Corporation, who considers these fuels to be products – not "secondary materials." If such fuels were considered "secondary materials," then our refineries could be subject to the unnecessary and costly regulatory burden of reviewing and ensuring conformance to the legitimacy criteria in 40 C.F.R. § 260.43. Substantial person-hours involving technical and legal disciplines must be expended when EPA imposes such criteria. Reversal of EPA's interpretation would ensure that this regulatory burden is not imposed.

12. Phillips 66 Company is a member of the American Petroleum Institute and has continuously been a member since May of 2012 and was a part of ConocoPhillips Company, also a member since a date before January 27, 2009.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 8, 2015.



Mark Deese

ORAL ARGUMENT NOT YET SCHEDULED
IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PETROLEUM
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No. 09-1038 (consolidated with
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15-1089, and 15-1094)

DECLARATION OF WILLIAM E. COBB,
FREEPORT-MCMORAN CORPORATION

I, William E. Cobb, swear or affirm under penalty of perjury, the following:

1. I am the Vice President, Environmental Services and Sustainable Development, for Freeport-McMoRan Corporation, a wholly-owned subsidiary of Freeport-McMoRan Inc. (collectively, “Freeport”). Freeport-McMoRan Inc. is the petitioner in No. 15-1088, consolidated with the cases captioned above. I base this Declaration upon my first-hand knowledge of the matters described herein. I am over the age of 21 and competent to make this Declaration.

2. In 2011, the U.S. Environmental Protection Agency (“EPA”) proposed amendments to its regulatory definition of “solid waste” under the Resource Conservation and Recovery Act (“RCRA”). *See* 76 Fed. Reg. 44,094 (July 22, 2011). Freeport submitted extensive comments on the proposed rule, explaining, among other things, that the changes expanded RCRA jurisdiction in a manner that exceeded EPA’s statutory authority and would negatively affect Freeport’s business operations. *See* Freeport-McMoRan Copper & Gold Inc. Comments, EPA-HQ-RCRA-2010-0742-0363 (Oct. 20, 2011). During the rulemaking process, representatives of Freeport also met with EPA officials to provide additional information and materials about its concerns regarding the proposed rule. *See* Summary of Meeting with Freeport-McMoRan Copper & Gold, EPA-HQ-RCRA-2010-0742-0379 (Dec. 5, 2013) (discussing Freeport presentation materials entitled “Impacts of EPA’s ‘Solid Waste’ Rule on Primary Mineral Processing & Recycling”).¹ For many years, I have been personally involved in the preparation of Freeport’s comments on this subject, and participated in multiple meetings with EPA.

¹ Freeport and its predecessor entities have long been engaged with, and submitted comments on, past EPA rulemakings affecting the definition of “solid waste” under RCRA. *E.g.*, Freeport-McMoRan Copper & Gold Inc. Comments, EPA-HQ-RCRA-2009-0315-0243 (Aug. 13, 2009); Freeport-McMoRan Copper & Gold Inc. Comments, EPA-HQ-RCRA-2002-0031-0528 (June 25, 2007); Phelps Dodge Corporation Comments, EPA-RCRA-2002-0031-0087 (Feb. 24, 2004).

3. I am familiar with the final rule issued by EPA amending the definition of “solid waste” under RCRA. *See* 80 Fed. Reg. 1694 (Jan. 13, 2015) (“Final Rule”). I am familiar with RCRA’s general requirements, implementing regulations, and compliance obligations—both as previously relevant to Freeport’s business activities prior to the Final Rule, and as they now appear to apply to those activities, under the Final Rule.

A. Introduction to Freeport’s Primary Metals Production Business

4. Freeport is in the business of extracting, concentrating, and processing naturally-occurring copper and molybdenum ores to produce pure metals and other valuable products. For example, a Freeport subsidiary operates a copper smelter in Miami, Arizona. Freeport produces several high-purity final products, including pure copper cathode, copper rod, molybdenum trioxide, and rhenium metal.

5. Although the specific production operations vary, Freeport’s products cannot be produced from naturally-occurring ores in a single step. Rather, low-concentration ores are incrementally concentrated and refined in a continuous, multi-step process to enhance their mineral content and recover target metals, until the mineral content is high enough to produce final products, such as solid metal.

- a. Freeport’s production operations begin by mining naturally-occurring ores that contain desired minerals in very low concentrations, such as

tenths of one percent (e.g., 0.1%). Ores typically contain metal bound in a complex mineral matrix (e.g., copper sulfide).

- b. Mined ores are physically crushed and concentrated into “ore concentrates,” which contain much higher concentrations (e.g., 30%) of the desired minerals in chemical form, that have been separated from non-valuable rock.
- c. Ore concentrates are the primary feedstock for the production operations (e.g., copper smelting) that Freeport uses to purify and recover solid metals and other products.

6. In addition to the primary target mineral (e.g., copper), Freeport also recovers other valuable minerals naturally present in ores, and generates other valuable products. For instance, in copper smelting, Freeport recovers sulfur-containing minerals and ultimately transforms them into commercial-grade sulfuric acid, which can be sold on the open market. Freeport also recovers precious metals and related compounds, such as silver, from copper ores.

7. Because of their incremental nature, mineral production operations necessarily generate valuable in-process intermediates and materials. Freeport carefully recovers and reprocesses these in-process intermediates and materials because they contain much higher concentrations of valuable minerals than naturally-occurring ores.

8. Some of these in-process intermediates and materials not only have commercial value, but play an important operational role. For example, Freeport uses a “weak” sulfuric acid solution generated in the copper smelter and acid plant as a valuable input for production of copper through “hydrometallurgy”—i.e., “leaching” copper from ore using solutions containing sulfuric acid and water. Also, Freeport’s copper smelter cannot operate without using cooled, partially-refined pieces of copper (i.e., revert) to control smelter furnace temperatures, as explained below.

9. As part of its ongoing mineral production operations, Freeport currently processes or reprocesses dozens of kinds of valuable, in-process intermediates and materials at the Miami facility. Before EPA promulgated the Final Rule, these in-process materials were not considered “discarded,” and thus did not constitute “solid waste” or “hazardous waste” subject to EPA’s RCRA jurisdiction. However, the Final Rule asserts broad jurisdiction to regulate all of these in-process intermediates and materials under the guise of certain “legitimacy factors,” which effectively impose new RCRA conditions and regulatory duties on Freeport’s use and management of these in-process materials. Further, on its face, the Rule appears to designate some of these in-process intermediates and materials as “sham recycled,” and therefore “discarded,” because they apparently cannot satisfy all of the new RCRA conditions and regulatory duties in the “legitimacy

factors.” Many of these in-process materials contain metals that are present in naturally-occurring mineral ores, or potentially-corrosive substances that are derived from constituents of naturally-occurring ores, and thereby can exhibit the “toxicity” or “corrosivity” characteristics in 40 C.F.R. §§ 261.22 and 261.24.

10. Deeming Freeport’s in-process intermediates and materials to be “sham recycled,” and therefore “discarded,” under the Final Rule and subjecting them to full-blown “hazardous waste” regulation under RCRA would impose new and costly regulatory obligations on Freeport. Under RCRA, “hazardous wastes” cannot be generated, transported, treated, stored, or disposed of except in compliance with strict regulatory management and permitting requirements.

11. As explained below, the Final Rule affects Freeport in other ways, as well. Even if the production and reuse of every in-process material at every Freeport facility were to qualify as “legitimate recycling,” the Final Rule effectively imposes RCRA regulatory duties and conditions on Freeport’s production and reuse of those in-process materials. The Final Rule, for instance, specifies how such in-process materials may be stored, requires analysis and documentation, labeling or logging, and appears to impose caps on the permissible concentrations of certain chemical constituents. The Final Rule restricts Freeport’s ability to produce and reuse those in-process materials in a manner that is most advantageous to its business.

12. Additionally, the Final Rule has created uncertainty about whether the production and use of certain in-process materials will be deemed “sham recycling.” As a result, the Final Rule has increased Freeport’s RCRA regulatory enforcement and compliance risks. To reduce the apparent scope of those risks, Freeport is compelled to consider less-favorable alternatives to its current beneficial production and reuse of these in-process materials.

B. The Final Rule Expanded the Definition of “Solid Waste” in Ways that Negatively Affect Freeport’s Business

13. Prior to 2008, an informal, non-binding EPA memorandum was the “primary source of guidance” for primary metals producers “in distinguishing between legitimate [recycling]” that falls outside EPA’s RCRA jurisdiction, and so-called “sham recycling,” which actually involves “discard” of materials, and thus triggers RCRA jurisdiction. *See* 73 Fed. Reg. 64,668, 64,700 (Oct. 30, 2008) (discussing EPA Office of Solid Waste and Emergency Response Directive 9441.1989(19)). That memorandum contains a list of non-exclusive, non-mandatory “criteria” to consider in distinguishing between “sham” and “legitimate” recycling.

14. Between 2008 and 2015, EPA established four “legitimacy” factors (the third and fourth of which were not mandatory) in determining whether a specified class of materials under certain additional regulatory exclusions from RCRA regulation was truly “recycled.” *See id.* at 64,759. Freeport does not rely

on those additional exclusions at the Freeport facilities at issue in this case. Therefore, prior to promulgation of the Final Rule in 2015, Freeport was not required to satisfy any “legitimacy” factors to determine that a particular in-process intermediate or material at Freeport’s facilities was not “discarded,” and therefore outside EPA’s RCRA jurisdiction.

15. The Final Rule significantly expanded EPA’s definition of “solid waste” by making three main changes.

- a. First, the Final Rule states that *any* “hazardous secondary materials” that are “sham recycled” automatically are deemed “discarded and a solid waste.” *See* 80 Fed. Reg. 1694, 1774 (Jan. 13, 2015) (codified at 40 C.F.R. § 261.2(b)(4), (g)).
- b. Second, the Final Rule defines “sham recycling” as any recycling that does not meet EPA’s definition of “legitimate recycling.” *Id.* (codified at 40 C.F.R. § 261.2(g)).
- c. Third, EPA amended its definition of “legitimate recycling” by drafting four “legitimacy factors,” which actually contain new conditions and regulatory duties, and then making all four “factors” mandatory for *all* recycling—not simply for the additional exclusions governed by the 2008 rule. *See id.* at 1773 (codified at 40 C.F.R. § 260.43).

16. Together, these changes significantly expanded the scope of EPA's asserted RCRA jurisdiction, and now would cover Freeport's mineral production and operational facilities in several unprecedented ways. First, the term "hazardous secondary materials" covers a range of in-process intermediates and materials that were not considered "discarded" under EPA's or Freeport's previous understanding of that term, and which were not previously subject to RCRA regulation. Second, the four mandatory legitimacy "factors" now apply to *all recycling activities*, including production and operational activities at Freeport facilities to which the pre-2015 legitimacy "factors" were irrelevant. Third, the mandatory legitimacy "factors" narrowly define "legitimate recycling," effectively imposing RCRA regulatory duties and conditions even on Freeport's production and reuse of in-process intermediates and materials that EPA *concedes* are "legitimately recycled" and are not "discarded." Fourth, on its face, the Final Rule appears to deem recycling activities that clearly involve no "discard," including activities previously acknowledged by EPA as "legitimate," to be a "sham."

C. The Final Rule Regulates In-Process Intermediates and Materials at Freeport Facilities That Previously Were Not Considered "Discarded," and Therefore Could Not Be Regulated as Solid or Hazardous Waste

17. The Final Rule appears to regulate many in-process materials that were not previously considered "discarded," and thus fell outside of EPA's RCRA regulatory jurisdiction.

Copper “revert”

18. Smelting copper ore to produce pure copper metal creates “revert”—i.e., partly-refined pieces of metallic copper that are in the process of being further refined. The term “revert” includes large, dense, solid pieces of copper metal generated during the process of cooling molten metal: e.g., cooled metal from the inside of ladles; drips, splashes, and spills from the handling of molten metal; and high-copper-content in-process material skimmed from the surface of copper furnaces. At Freeport’s facilities, large copper reverts are temporarily stored on the ground for cooling, and are crushed or re-sized before being fed back into the smelting process. “Revert” is valuable, typically 50-95% pure copper, as compared to the roughly 0.1% copper concentration of naturally-occurring mineral ores.

19. Freeport produces and uses copper “revert” as a valuable intermediate that is deliberately fed back into the copper smelting process. In a 2002 inspection report for the Miami facility, EPA concluded that because reverts “contain copper values several orders of magnitude higher than the ore,” they are a crucial “means of recovering copper that would otherwise escape from the smelter processes.” See EPA Region IX, Warning Letter and Certification of Violation Correction 8 (Apr. 9, 2002) (“Inspection Report”).

20. Revert has a commercial market value, and Freeport stores, buys, and sells revert depending on its business needs. *See* Inspection Report 9. Revert also serves an important operational role in the smelting process. The Miami smelter cannot be operated without cooled, partially-processed copper revert to control smelter furnace temperatures—essentially, “ice cubes” to moderate the temperature of baths of molten copper. The need for cooling reflects the fact that the chemical reactions occurring in certain copper production furnaces are exothermic: i.e., they produce heat. *Id.*

21. The 2015 Final Rule, however, appears to deem copper revert “sham recycled.” Under the third mandatory legitimacy “factor,” any recycling activity is a “sham” unless a secondary material is managed consistent with an “analogous raw material” or, where there is no such analogous raw material, “contained.” EPA has not defined “analogous raw material,” but under the plain meaning of that phrase, there do not appear to be “analogous raw material[s]” to copper revert, which has a copper concentration orders of magnitude higher than naturally-occurring mineral ores. As a result, to satisfy the third mandatory legitimacy “factor,” it appears that revert must be “contained.”

22. EPA’s definition of “contained” applies to “land-based unit[s],” but does not appear to be compatible with Freeport’s production and reuse of large pieces of partly-refined copper revert. The Final Rule states that revert must be

stored in a “unit” that prohibits “leaks or other continuing or intermittent unpermitted releases” (to include “releases through surface transport by precipitation runoff, releases to soil and groundwater, [and] wind-blown dust”) and the “unit” must be “designed . . . to prevent releases of hazardous secondary materials.” 40 C.F.R. § 260.10.

23. For operational and technical reasons, Freeport currently handles revert on the ground. Among other things, revert is generated at extremely high temperatures, and must cool before it can be manipulated, resized, and re-introduced into the smelting process. Large pieces of revert must be physically crushed or broken apart mechanically, using heavy equipment such as a backhoe. Even assuming “containment” units could be built, these temperatures and handling practices would likely damage them.²

24. The Final Rule has thus increased Freeport’s overall RCRA regulatory burden and constrained its ability to conduct its production operations. On the one hand, Freeport could remove copper revert from its production processes and instead manage it as “waste,” but would thereby lose the valuable copper and other minerals contained therein. On the other hand, Freeport could continue to use revert in the copper smelting process. But to reduce the RCRA enforcement risks

² In addition to its enriched copper content, revert contains other minerals and substances derived from naturally-occurring ores that would likely exceed EPA’s toxicity and corrosivity characteristics. See 40 C.F.R. §§ 261.22 and 261.24.

raised by the new “contained” factor, Freeport might then attempt to build a costly new containment structure for reverts (the integrity of which might be jeopardized by the high temperatures and heavy equipment routinely used in the production process). In any case, if EPA were to deem intermediate reverts “sham recycled,” and therefore “discarded” as “hazardous waste” because they fail to meet the new “contained” factor, continuing to use revert could subject Freeport’s copper production process to onerous RCRA “hazardous waste” regulation.

25. Moreover, even if Freeport’s revert management practices qualify as “contain[ment],” and even if Freeport’s use of reverts satisfies all of the other mandatory legitimacy “factors” and is deemed “legitimate recycling,” the Final Rule *still* imposes RCRA regulatory duties and conditions on Freeport’s production and reuse of copper revert. Among other things, the Final Rule appears to require Freeport to store revert in a “unit” that meets EPA’s specifications, to label the unit or maintain logs, and to ensure that revert does not cause Freeport’s products to contain chemical constituents that differ from EPA’s chosen “legitimate product or intermediate” or commodity standards. *See* 40 C.F.R. § 260.43(a)(3), (4). Furthermore, the Final Rule imposes an ongoing documentation burden on Freeport to demonstrate how its use of intermediate copper revert meets all four mandatory legitimacy factors, on pain of RCRA enforcement. *See* 80 Fed. Reg. at 1755-56.

Weak sulfuric acid

26. Freeport's Miami copper smelter operates in tandem with an "acid plant." That plant uses sulfur-mineral off-gases from the smelter to produce commercial-grade sulfuric acid (which can be sold as a commodity), as well as a weak sulfuric acid solution. The weak acid solution contains water, sulfuric acid, copper, and other constituents derived from naturally-occurring mineral ores.³

27. The weak sulfuric acid solution functions as a highly valuable input for Freeport's production of copper through the "hydrometallurgical" production system at the same site, which requires the use of acid and water. In that system, Freeport uses in-process weak acid to mine copper ore in a large land-based production (i.e., heap leach) facility. The weak acid extracts the copper from its mineral matrix (e.g., copper oxide) into liquid solution, and Freeport then "electroplates" the copper out of solution into solid metal sheets (i.e., copper cathodes). Thus, in addition to the acid and water values, the presence of some copper in the in-process weak acid solution is another significant benefit for this production system, as it is ultimately recovered as solid copper.

28. In 2002, EPA concluded that this production and reuse of in-process "weak acid" did not constitute "disposal." *See* Inspection Report 16-20. Among

³ The weak acid solution is a beneficially corrosive solution that contains metals that exceed the toxicity characteristic thresholds in 40 C.F.R. § 261.24.

other things, EPA concluded that the in-process “weak acid” substitutes for acid and water that would otherwise have to be purchased; that the weak acid derives “all its acid value and toxic metals from the sulfates and metals originally in the furnace [copper ore] feedstock”; and that the acid is used primarily to leach copper, not to dispose of any toxic metals present in the solution. *Id.* at 18-20.

29. However, the 2015 Final Rule asserts the authority to impose RCRA regulatory duties and conditions on the weak acid solution, and potentially to deem the in-process weak acid as “sham recycled,” and therefore “discarded” and subject to RCRA regulation as “hazardous waste.” The Final Rule increases Freeport’s RCRA regulatory burden in at least three ways.

30. First, even if Freeport’s use of the weak acid solution satisfies the four mandatory legitimacy “factors” and is deemed “legitimate recycling,” the Final Rule still imposes RCRA regulatory duties and conditions on Freeport’s production and reuse of that in-process material. Under the third mandatory factor, secondary materials for which EPA determines there is no “analogous raw material” must be “contained” in units that meet EPA’s specifications, documented, and labeled or logged. Under the fourth mandatory factor, weak acid’s regulatory status as non-discarded material depends on the solution’s chemical composition with respect to individual constituents, which Freeport apparently will be compelled to monitor going forward. Furthermore, the Final

Rule imposes a general and continuous documentation burden on Freeport to demonstrate how its use of weak acid meets all four mandatory legitimacy factors, an obligation that did not exist prior to EPA's promulgation of the Final Rule. *See* 80 Fed. Reg. at 1755-56.

31. Second, the fourth mandatory legitimacy factor appears to give EPA discretion to select sulfuric acid from other sources as the relevant “analogous” product to weak acid, even though Freeport uses in-process weak acid to produce additional solid copper. Under 40 C.F.R. § 260.43(a)(4), any recycling activity is a “sham” unless the “product of the recycling process” (which EPA apparently could designate as weak acid) “does not exhibit a hazardous characteristic . . . that analogous products do not exhibit,” and has concentrations of hazardous constituents “comparable to or lower than” in the analogous product or in qualifying “commodity standards.” *Id.*⁴

32. Because Freeport's in-process weak sulfuric acid solution derives from raw copper mineral ores, it contains trace constituents (including copper, which itself is later recovered through the heap leach operation) that are not present in sulfuric acid produced from different feedstocks (e.g., raw sulfur). The

⁴ Under 40 C.F.R. § 260.43(a)(4)(i)(B), commodity standards can be used as the relevant basis for comparison only if they “include levels that specifically address th[e] [relevant] hazardous constituents.” To Freeport's knowledge, there is no such commodity standard for its weak sulfuric acid solution, because Freeport produces that solution for Freeport's own on-site use in hydrometallurgy.

Final Rule does not appear to prevent EPA from selecting such acids (from different feedstocks) as the relevant “analogous product.” Because those acids do not contain the same trace constituents as acid from a copper smelter, the Final Rule would appear to require Freeport either to (1) undertake an “assessment” of the weak acid under 40 C.F.R. § 260.42(a)(4)(iii) (which still would provide no guarantees regarding its RCRA regulatory status, as explained below); (2) modify production processes (if technically feasible) to change the chemical composition of the in-process weak acid solution; (3) accept full-blown RCRA regulation, if EPA deemed weak acid the “product of the recycling process” (or disagreed with a possible “assessment”), and Freeport desired to continue to produce and reuse the in-process weak acid in the same manner; or (4) cease reusing the in-process weak acid entirely, and construct a costly new facility to manage it as “hazardous waste” from the outset.⁵

33. Third, even if Freeport were to conduct its own assessment and self-certify that the in-process weak acid “recycling” process is “legitimate” under 40 C.F.R. § 260.43(a)(4)(iii), Freeport would have to expend time and resources to satisfy those new RCRA regulatory obligations that did not exist prior to the Final Rule. Finally, simply by creating uncertainty about the regulatory status of in-

⁵ Until such a facility is fully constructed, Freeport would need to identify other facilities to manage the material off-site.

process weak acid, the Final Rule inflicts on Freeport a heightened degree of RCRA enforcement and compliance risk.

34. If the production and reuse of in-process weak acid is deemed “sham recycling,” Freeport could not continue to use the in-process solution in its current fashion without making substantial modifications to the operation of the copper smelter, acid plant, and other production facilities, to comply with RCRA’s management and permitting requirements. Conversely, if Freeport were to cease using the in-process weak acid solution for hydrometallurgy, it would incur significant costs by being forced to manage the in-process weak acid solution as a “hazardous waste,” and to purchase replacement materials (e.g., water and sulfuric acid). Designing and constructing a facility to manage the weak acid solution at Miami would cost tens of millions of dollars and take more than two years, with ongoing costs once operational of several million per year. In the interim, Freeport would need to identify facilities to manage the weak acid off-site, which would be highly costly (if adequate off-site capacity even exists).

D. The Final Rule Has Harmed Freeport

35. As described above, the Final Rule harms Freeport in several ways.

36. First, the Final Rule imposes a new RCRA requirement that Freeport satisfy four mandatory legitimacy “factors” for all recycling activity at all of its facilities. Prior to 2015, Freeport was not required to satisfy any mandatory

legitimacy “factors” when producing and reusing these in-process materials, or to satisfy other RCRA regulatory conditions or duties, because the in-process materials are not “discarded,” and therefore were considered outside of EPA’s RCRA regulatory jurisdiction.

37. Second, the Final Rule effectively imposes RCRA regulatory duties and conditions even on in-process materials that EPA would agree are legitimately recycled and thus not “discarded.” As noted above, these duties and conditions include an ongoing documentation burden, requiring Freeport to demonstrate how its use of in-process materials meets all four mandatory legitimacy factors. The Final Rule also requires that in-process materials for which there is no “analogous raw material” be “contained.” The Rule appears to impose *de facto* caps on the chemical composition of in-process materials—caps that EPA can adjust through its unilateral selection of a particular “analogous product.” Thus, even if every in-process material at every Freeport facility were to satisfy all the mandatory legitimacy factors, the Final Rule constrains Freeport’s ability to produce and reuse those in-process materials in a manner most advantageous to its business operations.

38. Third, the Final Rule appears to deem certain in-process materials at Freeport’s sites to be “sham recycled” and therefore “discarded.” Continuing to use in-process materials previously viewed as outside RCRA jurisdiction, but now

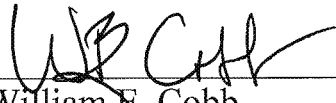
deemed to be “discarded” and a “hazardous waste,” would require extensive changes to certain Freeport production operations, at significant cost. Discontinuing the current beneficial production and reuse of these in-process materials would also impose significant costs, on the order of millions of dollars of lost valuable mineral content, and new management and disposal costs.

39. Fourth, the Final Rule creates uncertainty about the regulatory status of in-process materials that have long been viewed as falling outside RCRA jurisdiction, under both the plain meaning of the RCRA statute and EPA’s prior regulations and regulatory determinations. Freeport facilities, such as its copper smelter, have relied upon the plain meaning of “discard” since RCRA’s enactment. By upsetting the plain meaning of “discard” and longstanding, well-settled regulatory determinations (under which Freeport’s in-process materials were understood to fall outside RCRA jurisdiction), the Final Rule increases Freeport’s RCRA enforcement and compliance risks. Freeport is incurring new costs in ongoing efforts to mitigate these risks.

* * *

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 9, 2015.



William E. Cobb

NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 09-1038
(consolidated with Nos. 15-1083, 15-1085, 15-1088, 15-1089, 15-1094)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PETROLEUM INSTITUTE, ET AL.,

Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

ON PETITIONS FOR REVIEW OF A FINAL REGULATION
PROMULGATED BY THE UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

FINAL BRIEF FOR RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici.

Except for amici Eastman Chemical Company and Solvay, USA Inc., all parties, intervenors, and amici appearing in this Court are listed in the Brief for Industry Petitioners and in the Brief for Environmental Petitioners.

B. Rulings Under Review.

References to the rulings at issue appear in the Brief for Industry Petitioners and in the Brief for Environmental Petitioners.

C. Related Cases.

Case No. 09-1038 was previously before this Court and addressed in *American Petroleum Institute v. EPA*, 683 F.3d 382 (D.C. Cir. 2012). To undersigned counsel's knowledge, there are no other related cases currently pending in this Court or any other court.

s/ Daniel R. Dertke

DANIEL R. DERTKE

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40 C.F.R. § 261.4(a)(24)	11, 77
40 C.F.R. § 261.6(a)(4)	2, 53
40 C.F.R. § 261.33	73

FEDERAL REGISTER

72 Fed. Reg. 14,172 (Mar. 25, 2007)	83, 85
73 Fed. Reg. 64,668 (Oct. 30, 2008)	1, 8, 9, 14, 25, 30, 32, 37, 48, 83, 85
76 Fed. Reg. 15,456 (Mar. 21, 2011)	7, 79
76 Fed. Reg. 44,094 (July 22, 2011)	20, 75, 76, 88, 89, 91, 92, 93, 94, 95, 100, 102
80 Fed. Reg. 1694 (Jan. 13, 2015)	1, 15, 24, 29, 30, 32, 33, 36, 37, 38, 39, 40, 41, 47, 49, 50, 51, 52, 60, 61, 62, 63, 64, 65, 67, 68, 69, 70, 76, 80, 85, 86, 90, 96, 97, 98, 100, 101, 102

LOCAL RULES

Circuit Rule 36(e)(1)	27
Circuit Rule 36(e)(2)	27

* Authorities chiefly relied upon are marked with an asterisk.

GLOSSARY

2015 Rule	80 Fed. Reg. 1694 (Jan. 13, 2015)
2008 Rule	73 Fed. Reg. 64,668 (Oct. 30, 2008)
<i>ABR</i>	<i>Association of Battery Recyclers, Inc. v. EPA</i> , 208 F.3d 1047 (D.C. Cir. 2000)
<i>AMC I</i>	<i>American Mining Congress v. EPA</i> , 824 F.2d 1177 (D. C. Cir. 1987)
<i>AMC II</i>	<i>American Mining Congress v. EPA</i> , 907 F.2d 1179 (D. C. Cir. 1990)
APA	Administrative Procedure Act
API	Petitioner American Petroleum Institute
<i>API I</i>	<i>American Petroleum Institute v. EPA</i> , 906 F.2d 729 (D.C. Cir. 1990)
<i>API II</i>	<i>American Petroleum Institute v. EPA</i> , 216 F.3d 50 (D.C. Cir. 2000)
<i>API III</i>	<i>American Petroleum Institute v. EPA</i> , 683 F.3d 382 (D.C. Cir. 2012)
EPA	U.S. Environmental Protection Agency
FAQ	Frequently Asked Questions
JA	Joint Appendix
RCRA	Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k
RTC	Revisions to the Definition of Solid Waste Final Rule, Response to Comments Document, Summaries and Responses (December 10, 2014)

STATEMENT OF JURISDICTION

With one exception, this Court has jurisdiction pursuant to 42 U.S.C. § 6976(a)(1) over Nos. 15-1083, 15-1085, 15-1088, 15-1089, and 15-1094, each of which timely seeks review of EPA's final rule entitled "Definition of Solid Waste; Final Rule," 80 Fed. Reg. 1694 (Jan. 13, 2015) (the "2015 Rule") (JA0265), issued under the Resource Conservation and Recovery Act ("RCRA"). The exception is the challenge to a statement in a supporting document that summarizes EPA's response to comments received during the rulemaking; that document is not a reviewable agency action under RCRA, and the challenge to EPA's statement is not ripe for judicial review.

This Court lacks jurisdiction over No. 09-1038, which seeks review of EPA's final rule entitled "Revisions to the Definition of Solid Waste; Final Rule," 73 Fed. Reg. 64,668 (Oct. 30, 2008) (the "2008 Rule") (JA0065), also issued under RCRA. The American Petroleum Institute ("API") timely filed No. 09-1038, but API's challenge to the 2008 Rule's allegedly disparate treatment of spent catalysts from petroleum refining is moot. API's challenge to EPA's authority under RCRA to regulate spent catalysts is untimely, because EPA asserted that authority in an earlier rule, and is waived because API did not articulate any challenge to the 2008 Rule in its opening brief here.

STATEMENT OF THE ISSUES

Petitioners from industry and from environmental advocacy groups challenge EPA's definition of solid waste under RCRA. The central organizing idea in defining solid waste is whether or not a material has been discarded. In the 2015 Rule, EPA grappled with that question in the context of recycling.

Industry Petitioners raise six issues:

1. EPA has always distinguished between "legitimate" recycling and discard in the guise of recycling. Does EPA's definition of legitimate recycling improperly result in the regulation of materials that have not been discarded? (Arguments I.A through I.C)
2. Since 1985, EPA has defined in guidance documents what constitutes legitimate recycling, and that guidance applied to all exclusions from the definition of solid waste. Once EPA codified what "legitimate" means, was it reasonable to require all exclusions to comply with the codified definition of legitimate recycling? (Argument I.D)
3. The used oil exclusion in 40 C.F.R. § 261.6(a)(4) says that the exclusion "is not subject to the requirements of parts 260 through 268 of this chapter." Does the codified definition of legitimacy, which is in part 260, apply to the used oil exclusion? (Argument I.E)
4. The verified recycler exclusion allows companies to transfer materials to third-parties for off-site recycling under certain conditions. Was it

reasonable for EPA to place the burden of proof on regulated entities to demonstrate that such transfers are not in fact discard and therefore cannot be regulated? (Argument II.A)

5. In the 2008 Rule's precursor to the verified recycler exclusion, one condition required the generator of the material being transferred to conduct an environmental audit of a third-party recycler before transferring materials to it for off-site recycling, unless that third party had a RCRA permit. In the verified recycler exclusion, instead of an audit by the generator, the third-party recycler must obtain a variance if it does not have a RCRA permit. Does the variance regulate materials that have not been discarded? (Argument II.B)
6. A commercial chemical product is a secondary material if it is either placed on land, or burned as a fuel, contrary to its normal manner of use. Does the Court have jurisdiction to review a statement regarding commercial chemical products in a background document, and if so, did EPA change its position when it explained that a commercial chemical product might be a secondary material if the product cannot be used in its ordinary manner? (Argument III)

Environmental Petitioners raise four issues:

1. EPA's 2011 proposal announced EPA's intention to withdraw the 2008 Rule's precursor to the verified recycler exclusion, but also requested

comment on adding conditions to the exclusion as an alternative. Is the verified recycler exclusion, which adds three conditions to the 2008 Rule's precursor to that exclusion, a logical outgrowth of EPA's proposal? (Argument IV.A)

2. If a generator is legitimately recycling its hazardous secondary materials and complies with all of the conditions in the verified recycler exclusion, is the generator nonetheless disposing of, throwing away, or abandoning those materials solely because the generator pays a third party to transfer the materials to an off-site recycler? (Argument IV.B)
3. The verified recycler exclusion requires materials to be contained, prohibits speculative accumulation of materials, and requires compliance with financial assurance, emergency preparation, and emergency response requirements. Do these conditions reasonably define the circumstances that do not constitute discard? (Argument IV.C)
4. All of the exclusions from the definition of solid waste that were in place prior to the 2008 Rule required recycling activities to be legitimate as expressed in EPA guidance, but these exclusions had varying requirements regarding containment and notification. Was it reasonable for EPA to defer action on codifying uniform containment and notification standards for all exclusions? (Argument V)

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are in an addendum bound separately from this brief.

STATEMENT OF THE CASE

EPA promulgated the 2015 Rule to further clarify the regulatory definition of “legitimate” recycling, which EPA had first codified in the 2008 Rule. Prior to the 2015 Rule, some exclusions from the definition of solid waste incorporated the 2008 Rule’s codified definition of that concept, while EPA used guidance to apply the legitimacy requirement to other exclusions. The 2015 Rule adds clarity and consistency by applying to all of those exclusions a single codified definition of legitimate recycling. The 2015 Rule also makes the definition more flexible, by expanding upon the ways in which a company can demonstrate legitimacy.

The 2015 Rule also addresses potential problems with the implementation of the 2008 Rule’s exclusion for materials transferred to third-parties for off-site recycling. One condition of that exclusion was that the generator of the materials being recycled had to perform an environmental audit of the potential third-party recycler. EPA concluded that this condition did not allow for sufficient oversight and public participation prior to the commencement of off-site recycling operations. To address this gap, the 2015 Rule replaces the generator-conducted audit with a variance process. While the audit and the variance largely address the same issues, the variance requires the third-party recycler to demonstrate to the regulatory authority that the

materials it receives will be legitimately recycled and not discarded, and that potential risks to the surrounding community will be minimized. The 2015 Rule requires generators to comply with certain emergency preparedness and response planning requirements. These changes strike an appropriate balance between encouraging safe and legitimate recycling of hazardous secondary materials, and ensuring that the exclusion for transferred materials works as intended.

A. Statutory Background

The Resource Conservation and Recovery Act (“RCRA”) defines “solid waste” as “any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations” 42 U.S.C. § 6903(27). Subtitle C of the statute creates a comprehensive federal program for the management of “hazardous waste.” *Id.* §§ 6921-39f. Hazardous waste is “a solid waste” that “may . . . pose a substantial present or potential hazard to human health or the environment when improperly . . . managed.” *Id.* § 6903(5)(B).

EPA may authorize states to administer the RCRA Subtitle C hazardous waste program within the state. Authorized states must adopt any new federal requirements that are more stringent than existing requirements, but are not required to adopt revisions that are less stringent. Exclusions from the definition of solid waste, which are deregulatory in nature, only go into effect in authorized states that choose to

adopt them, and in states where EPA administers the RCRA program. *See generally American Petroleum Instit. v. EPA*, 683 F.3d 283, 300 (D.C. Cir. 2012) (“*API III*”).

This Court has on several occasions addressed the meaning of the term “discarded,” which is a prerequisite for a material to be regulated as a solid waste. *See Am. Mining Cong. v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987) (“*AMC I*”) (secondary materials that are reused in an ongoing production process are not discarded and thus are not solid or hazardous waste); *Am. Petroleum Inst. v. EPA*, 906 F.2d 729 (“*API I*”) (D.C. Cir. 1990) (*AMC I* is not applicable to materials that have been discarded prior to reclamation); *Am. Mining Cong. v. EPA*, (“*AMC II*”) 907 F.2d 1179 (D.C. Cir. 1990) (same); *Ass’n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1053 (D.C. Cir. 2000) (“*ABR*”) (reuse of materials does not have to be immediate to be considered part of an ongoing production process); *Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 55-58 (D.C. Cir. 2000) (“*API II*”) (EPA failed to adequately explain why residual oil extracted from primary wastewater treatment at petroleum refineries had been discarded); *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1269 (D.C. Cir. 2003) (secondary materials that are “indistinguishable in the relevant respects” from commercial products are appropriately regulated as products).

In its most recent decision, *Sohay USA Inc. v. EPA*, 608 Fed. Appx. 10 (D.C. Cir. 2015), this Court upheld a rule that defined when certain non-hazardous secondary materials are solid waste when used in combustors. *See* 76 Fed. Reg. 15,456 (Mar. 21, 2011). While *Sohay* arose in the context of non-hazardous waste regulation,

the statutory definition of solid waste, and thus the meaning of “discard,” applies equally to both hazardous and non-hazardous waste. The rule in *Sohay* was a mirror-image of the rule at issue here. Like the 2015 Rule, it required secondary materials to meet a legitimacy test in order to be excluded from the definition of solid waste. 608 Fed. Appx. at 12. And, like the 2015 Rule, it presumed that secondary materials that are transferred to a third-party for off-site recycling are discarded and therefore wastes. *Id.*

B. Factual Background

EPA has long recognized that some materials destined for recycling are not solid waste, because some recycling practices bear more resemblance to normal manufacturing. 73 Fed. Reg. at 64,670/2 (JA0067).¹ To recognize this distinction, EPA refers to “hazardous secondary materials,” which are materials that would be classified as hazardous wastes if discarded. *Id.* at 64,669/1 (JA0066). “Secondary materials” are any materials that are not the primary product of a manufacturing or commercial process, and can include byproducts, spent materials, and sludges. 40 C.F.R. § 261.1(c)(1) – (3); *see also id.* at § 241.2. A secondary material can be hazardous because it exhibits certain characteristics, or because it is specifically listed as hazardous.

¹ Recycling includes reclamation, 40 C.F.R. § 261.1(c)(7). For convenience in this brief we refer generically to recycling.

Prior to 2008, EPA had promulgated numerous exclusions from the definition of solid waste for recycled materials. Some exclusions are generic. For example, under section 261.2, sludges and by-products that exhibit a characteristic of a hazardous waste are excluded from the definition of “solid waste” when they are reclaimed. *Id.* § 261.2(c)(3) and Table 1. Other exclusions are material-specific. There were 32 such generic and specific exclusions as of 2008. 76 Fed. Reg. 44,094, 44,139/2 (July 22, 2011) (JA0249).

In the 2008 Rule, EPA adopted additional exclusions for recycled materials: one for any hazardous secondary materials that are generated and recycled under the control of the generator, and one for any hazardous secondary materials that are transferred to a third-party for off-site recycling. 73 Fed. Reg. at 64,669/2 – 70/1 (JA0066-0067). Both the “generator-controlled” exclusion and the “transfer-based” exclusion had several conditions, including the requirement that the recycling be legitimate, which EPA defined in its regulations for the first time in the 2008 Rule.

1. The generator-controlled exclusion.

The 2008 Rule’s version of the generator-controlled exclusion required that hazardous secondary materials recycled under the control of the generator (*i.e.*, onsite, within the same company, or through certain types of toll manufacturing agreements) had to be contained, could not be speculatively accumulated, could not be subject to one of the material-specific exclusions, and had to be legitimately recycled. 40 C.F.R.

§§ 261.2(a)(ii), 261.4(a)(23) (2014).² In addition, generators were required to notify EPA of their intent to perform on-site recycling. *Id.* § 261.4(a)(23)(vi) (2014).

None of these provisions changed in the 2015 Rule. Materials must still be contained, but EPA has now defined that term, which it had not previously done. 40 C.F.R. § 260.10. Materials still cannot be speculatively accumulated, and EPA has added a labeling requirement to that condition. *Id.* § 261.1(c)(8). Materials still cannot be eligible for a material-specific exclusion. *Id.* § 261.4(a)(23)(ii)(D). Materials still must be legitimately recycled. *Id.* § 261.4(a)(23). And notification is still required. *Id.* § 261.4(a)(23)(ii)(C). EPA added two further provisions in the 2015 Rule: generators must now document how each element in the legitimacy test has been met, and generators must meet emergency preparedness and response planning requirements. *Id.* § 261.4(a)(23)(ii)(E), (F).

2. The transfer-based exclusion.

The 2008 Rule's version of the transfer-based exclusion prohibited the speculative accumulation of hazardous secondary materials, and prohibited their storage at a transit facility for more than 10 days. 40 C.F.R. § 261.4(a)(24)(i), (ii) (2014). Materials could not be eligible for a material-specific exclusion, and the recycling had to be legitimate. *Id.* § 261.4(a)(24)(iii), (iv) (2014). In addition, the

² The 2008 Rule's version of the generator-controlled exclusion appeared in two different subsections of part 261, depending on whether or not the materials were handled in land-based units. The 2015 Rule combines these provisions into 40 C.F.R. § 261.4(a)(23).

generator had to contain the materials, and maintain certain records for three years.

Id. § 261.4(a)(24)(v) (2014). None of these conditions changed in the 2015 Rule. 40 C.F.R. § 261.4(a)(24)(i) – (v).

In addition to the generator, the third-party recyclers also had to comply with conditions in the 2008 Rule’s version of the exclusion. They had to maintain records, manage the hazardous secondary material in a manner at least as protective as an analogous raw material, contain the material, manage any residuals, and meet financial assurance requirements. 40 C.F.R. § 261.4(a)(24)(vi) (2014). They also had to notify EPA or the authorized state agency that they were recycling hazardous secondary materials. *Id.* § 261.4(a)(24)(vii) (2014). None of these conditions changed in the 2015 Rule. 40 C.F.R. § 261.4(a)(24)(vi), (vii).

Finally, in the 2008 version of the exclusion, generators could only send their materials to a recycler that possessed a RCRA permit or interim status. 40 C.F.R. § 261.4(a)(24)(v)(B) (2014). If the recycler had neither of these, then the generator had to make “reasonable efforts” to ensure the recycler would legitimately recycle the materials and properly manage them. *Id.* The regulation included detailed provisions describing what this “reasonable efforts” audit entailed. The generator had to determine whether the recycling was legitimate, whether the proper authorities had been notified of the recycling activities, whether the financial assurance requirements had been met, whether there were any enforcement actions within the past 3 years, whether the recycler was a significant non-complier, whether the recycler had proper

training and equipment, and whether the recycler would properly manage any residuals. *Id.*

The 2015 Rule makes one change in this condition. Generators still can only send their materials to a recycler that possesses a RCRA permit or interim status, but now, if the recycler has neither of these, then the *recycler* has to obtain a variance from EPA. 40 C.F.R. § 261.4(a)(24)(v)(B). The requirements for obtaining a variance mirror the “reasonable efforts” audit that generators had to undertake pursuant to the 2008 Rule. As before, the recycling must be legitimate, and financial assurance requirements must be met. *Id.* § 260.31(d)(1), (2). The recycler cannot have any non-compliance. *Id.* § 260.31(d)(3). The recycler must have the necessary permits to manage residuals. *Id.* § 260.31(d)(5). And, the recycler must address the potential for risk to proximate populations from unpermitted releases of the hazardous secondary material, *id.* § 260.31(d)(6), which is a new requirement.

In addition to this change from an environmental audit conducted by the generator to a variance granted by EPA or an authorized state, the 2015 Rule requires the generator to comply with emergency preparedness and response requirements. *Id.* § 260.31(d)(4). To distinguish the 2015 Rule’s version of the transfer-based exclusion from the 2008 Rule’s version of that exclusion, the 2015 Rule refers to the revised exclusion as the verified recycler exclusion.

3. The definition of legitimacy.

The third major action EPA took in the 2008 Rule (as is relevant here) was to codify the pre-existing definition of legitimacy. Prior to 2008, that definition was expressed in preambles and guidance. The definition has four basic elements, or factors: the hazardous secondary material being recycled must provide a useful contribution, the recycling must produce a useful product, the hazardous secondary material must be managed as a valuable commodity, and the recycled product cannot have significant concentrations of hazardous constituents, or hazardous characteristics, that are not present in analogous products made with virgin materials.

When EPA codified this definition in the 2008 Rule, at 40 C.F.R. § 260.43, EPA recognized that there could be situations where either the third or the fourth factor was not met, yet the process was still legitimate recycling. In order to address this, the definition required companies to consider the third and fourth factors, but if a company could demonstrate that its recycling was nonetheless legitimate, it was not required to meet them.

The codified definition of legitimacy applied directly to the two new exclusions promulgated in the 2008 Rule, the generator-controlled and the transfer-based exclusions. In contrast, the existing guidance-based legitimacy criteria continued to apply to the 32 generic and material-specific exclusions that pre-dated the 2008 Rule (sometimes referred to as the pre-2008 exclusions). EPA explained how the four factors in the codified legitimacy test at 40 C.F.R. § 260.43 are substantively the same

as the guidance-based legitimacy factors. 73 Fed. Reg. at 64,700/3, 64,708-10 (JA0097, JA0105-0107). States, however, could choose to adopt the codified definition of legitimacy for all recycling. *Id.* at 64,754/1 (JA0151).

In the 2015 Rule, EPA made three changes to the definition of legitimacy. First, because some companies were not even evaluating whether the third and the fourth factors were met, EPA made these factors mandatory. Second, to retain the flexibility that EPA recognized was still necessary, EPA amended the third and fourth factors of the definition.

Specifically, the third factor examines whether the hazardous secondary material is being managed as a valuable commodity. At a minimum, Factor 3 as codified in the 2008 Rule required materials to be managed in a consistent manner as the analogous raw materials. 40 C.F.R. § 260.43(c)(1) (2014). In the 2015 Rule, EPA adds an alternative to that minimum requirement, that hazardous secondary materials could also be managed “in an equally protective manner” as an analogous raw material. 40 C.F.R. § 260.43(a)(3). In the case where there is no analogous raw material, Factor 3 required the material to be contained. This requirement was not changed in the 2015 Rule, but EPA added a definition of “contained.” *Id.*; *see also* 40 C.F.R. § 260.10.

The fourth legitimacy factor examines whether the product of the recycling is comparable to a legitimate product. This factor ensures that toxics are not “along for

the ride,” which could indicate that the product of the recycling includes hazardous constituents that are being discarded. 80 Fed. Reg. at 1726/2 (JA0297).

Under the 2008 Rule, a product was comparable if it did not have a “significant” concentration of hazardous constituents that were not in an analogous product, if it did not have concentrations of hazardous constituents that were “significantly” elevated from the concentrations in an analogous product, and if it did not have hazardous characteristics that analogous products did not exhibit. 40 C.F.R. § 260.43(c)(2)(i) – (iii) (2014). In the 2015 Rule, EPA replaced the concept of “significant” concentration with the concept that the concentration of hazardous constituents must be “comparable” to that in an analogous product. 40 C.F.R. § 260.43(a)(4). The 2015 Rule also recognizes that the product of recycling is comparable to an analogous product made from virgin materials if the hazardous constituent concentrations meet widely-recognized standards or specifications, assuming those standards or specifications address the hazardous constituents. *Id.*

The 2015 Rule also makes the fourth legitimacy factor more flexible by addressing the situation where there is no analogous product. In that case the product of the recycling is comparable to a legitimate product if it meets widely-recognized standards or specifications, or if the hazardous secondary material is returned to the original manufacturing process. *Id.* The 2015 Rule also includes a means by which a company can still show that its recycling is legitimate, even if the fourth factor is not

otherwise met. To do so, a company must document and certify that its process is legitimate recycling, and notify EPA. *Id.*

The third change that EPA made in the 2015 Rule was to apply the codified definition of legitimacy to all exclusions, including the 32 pre-2008 generic and material-specific exclusions. EPA accomplished this by codifying its long-standing policy that “sham recycling” is a type of discard.³ 40 C.F.R. §§ 261.2(b)(4), (g).

EPA also considered, but deferred a decision on, whether to apply containment and notification conditions to all of the pre-existing exclusions.

C. Procedural Background

Most of the procedural history leading up to the 2008 Rule is recounted in *API III*, 683 F.3d at 283. API petitioned for review of the 2008 Rule in No. 09-1038, challenging EPA’s deferral of a decision whether spent petroleum refining catalysts could be eligible for the 2008 Rule’s transfer-based exclusion. API also argued that EPA lacked statutory authority to regulate spent catalyst, even though it was listed as a hazardous waste in 1998, because, API asserted, the catalysts are not discarded. Gulf Chemical and Metallurgical Corporation, a spent catalyst recycler, moved to intervene; API objected, arguing that Gulf lacks standing. Gulf’s motion remains pending, as does Gulf’s motion to dismiss No. 09-1038.

³ As discussed in Argument I.E, below, the used oil exclusion appears in section 261.6(a)(4), and has specific, and unique, provisions regarding legitimacy.

The Sierra Club also filed a petition for judicial review of the 2008 Rule, No. 09-1041. After negotiating a settlement with Sierra Club, EPA agreed to re-consider the 2008 Rule's transfer-based exclusion, among other issues, and published a notice of proposed rulemaking in July 2011. In light of EPA's reconsideration of the 2008 Rule's transfer-based exclusion, the Court reasoned that API's disparate treatment argument was not prudentially ripe, and held No. 09-1038 in abeyance. *See* 683 F.3d at 256.

In the July 2011 proposed rule, EPA proposed to make the third and fourth legitimacy factors mandatory, but more flexible. EPA also proposed to apply the definition of legitimacy, as amended, to the 32 previously adopted generic and material-specific exclusions, as a way of implementing EPA's long-standing policy that sham recycling results in discard. EPA also sought comment on whether to codify new conditions for containment and notification that likewise would apply to all previously adopted exclusions.

EPA also proposed to withdraw the 2008 Rule's transfer-based exclusion, and replace it with an alternative set of hazardous waste regulations for hazardous recyclable materials, but sought comments on other approaches, including adding conditions to ensure that the exclusion does not result in discard.

In the 2015 Rule, EPA adopted the changes to the third and fourth legitimacy factors, and added "sham recycling" to the definition of solid waste, which had the effect of applying the legitimacy test to the 32 previously adopted exclusions. EPA

deferred action on whether to codify new conditions requiring containment and notification, reasoning that EPA lacked a sufficient record to support such an across-the-board action for these conditions.

Once EPA issued the 2015 Rule, Sierra Club voluntarily dismissed No. 09-1041, but API moved to consolidate No. 09-1038 with the newly filed petitions for review of the 2015 Rule. The Court granted the unopposed motion, and this briefing on the consolidated petitions followed.

SUMMARY OF ARGUMENT

EPA reasonably decided to make the third and fourth factors in the definition of legitimacy mandatory, and reasonably applied that definition to the 32 pre-existing exclusions from the definition of solid waste. The concept of legitimate recycling is not, as Industry Petitioners seem to think, a set of conditions that EPA imposes on hazardous secondary materials that are actually being recycled. Instead, it is means of determining whether those materials really are being recycled, as opposed to discarded in the guise of recycling. The application of this test is consistent with this Court's precedents from *AMC I* in 1987 through and including *Solvay* in 2015. The Court's opinion in *Solvay* is particularly instructive, because in that case EPA dealt with non-hazardous secondary materials in virtually the same manner as EPA has dealt with hazardous secondary materials in this case. In both instances, EPA codified a definition of legitimate recycling for companies to apply to a wide range of secondary materials.

Industry Petitioners do not dispute EPA's long-standing position that "recycling" cannot be used as a disguise for discarding hazardous secondary materials. Instead, they challenge its application to continuous industrial processes. They also focus on the third factor, which requires hazardous secondary materials to be contained (in some circumstances), and the fourth factor, which requires the product of recycling to be comparable to products that are made with virgin materials. But the changes that EPA made to the definition of legitimacy in 2015 make the definition *more* flexible, not less. Industry Petitioners attempt to illustrate their point by discussing how these factors call into question the legitimacy of two specific recycling processes, one for copper revert and one for weak acid. EPA confirmed in a 2002 inspection report that both of those specific processes are legitimate, and has repeatedly stated that companies do not need to revisit such prior determinations.

The second group of challenges is to the verified recycler exclusion, which is being simultaneously challenged as overly restrictive (by industry) and as overly lax (by the environmental groups). Industry Petitioners assert that third-party recycling should not be presumed to be discard at all, while Environmental Petitioners assert that third-party recycling is discard by definition, at least when the third party is paid to transport the materials to an off-site recycler. This simply underscores that EPA developed common sense and reasonably-tailored conditions to ensure that hazardous secondary materials transferred to third-parties for recycling are not in fact discarded. It is reasonable for EPA to adopt a presumption that transferring secondary materials

to a third-party for recycling is discard. The basis for that presumption is well-supported in the record, and the same presumption was recently upheld in *Sohay*. In contrast, Environmental Petitioners consider payment for the transfer of materials to a third-party for legitimate recycling to constitute discard automatically. That is not dictated by RCRA's plain language or by this Court's precedents, and ignores the situations where a company legitimately recycles its hazardous secondary materials despite paying a transporter to transfer those materials to a recycler.

The third group of challenges is Environmental Petitioners' argument that EPA should have taken additional action on the pre-2008 exclusions. EPA's proposed rule was clear that it was "not reopening comment on any substantive provisions of the [pre-2008] exclusions or exemptions," 76 Fed. Reg. at 44,138/3 (JA0248), and EPA did not undertake the "serious, substantive reconsideration" of each of the 32 exclusions that would be necessary to reopen them. *See Mendoza v. Perez*, 754 F.3d 1002, 1019 n.12 (D.C. Cir. 2014).

In addition, EPA reasonably deferred action on adding codified containment and notification conditions and sufficiently explained its reasons for doing so. EPA explained that it had proposed adding these conditions to improve enforcement and, thereby, protect human health and the environment. However, the record was not sufficient to support adding uniform containment and notification conditions across all 32 pre-2008 exclusions. Specifically, the connection between environmental harm and the exclusions was not sufficiently clear for the purpose of adding these blanket

conditions, the interaction between the individual existing exclusions and the proposed conditions was not sufficiently developed in the record, and it was not clear whether the burden of the proposed notification provision on states would enhance compliance monitoring. In light of the insufficiency of the record, EPA instead elected to proceed by gathering additional information about containment and notification in the context of each specific exclusion.

STANDARD OF REVIEW

Review of EPA's promulgation of final regulations under RCRA is governed by the Administrative Procedure Act ("APA"). The Court may hold unlawful and set aside agency action if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or in excess of EPA's "statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(A), (C).

With regard to questions of statutory interpretation, the Court must first consider whether Congress has directly addressed the particular question at issue. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). If the statute is silent or ambiguous on a particular issue, the Court must accept the agency's interpretation if it is reasonable; the agency's interpretation need not represent the only permissible reading of the statute nor the reading that the Court might originally have given the statute. *Id.* at 843 & n.11.

The "arbitrary or capricious" standard presumes the validity of agency actions, and a reviewing court is to uphold an agency action if it satisfies minimum standards

of rationality. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 520-21 (D.C. Cir. 1983); *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1976) (en banc). Where EPA has considered the relevant factors and articulated a rational connection between the facts found and the choices made, its regulatory choices must be upheld. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Where the agency's decision rests on an evaluation of complex scientific data within the agency's technical expertise, courts are extremely deferential. *Ethyl Corp.*, 541 F.2d at 36; *Am. Trucking Ass'ns, Inc. v. EPA*, 283 F.3d 355, 374 (D.C. Cir. 2002).

ARGUMENT

I. INDUSTRY PETITIONERS' CHALLENGES TO LEGITIMACY FACTORS 3 AND 4 LACK MERIT.

The third and fourth factors in the definition of legitimacy are that hazardous secondary materials must be managed as a valuable commodity, and that the product of the recycling cannot have significant concentrations of hazardous constituents, or exhibit hazardous characteristics, that are not present in analogous products made with virgin materials. 40 C.F.R. § 260.43(a)(3), (4). These factors were part of the definition of legitimacy in the 2008 Rule, but “some stakeholders continue[d] to be under the mistaken impression” that these factors could be ignored, even though the 2008 Rule stated that they must be considered, and that failure to meet them could indicate that a recycling process is not legitimate. 80 Fed. Reg. at 1722/3 (JA0293). In order to “give these factors the proper weight,” EPA reasonably made them

mandatory. *Id.* at 1723/1 (JA0294). EPA also provided more explanation for both factors, and additional flexibility “to address situations where the recycling is legitimate, but the specific situation might not meet the legitimacy factor.” *Id.*

Industry Petitioners argue that these factors cannot be applied to hazardous secondary materials destined for recycling in an ongoing industrial process. Industry Petitioners then delve into the details of Factor 3 and Factor 4, and “highlight” EPA’s “jurisdictional overreach” in the context of two specific secondary hazardous materials generated during copper smelting (copper revert and weak sulfuric acid). Industry Pet. Br. 26.⁴ Before addressing the nuances of Factor 3 and Factor 4 and their potential application to specific hazardous secondary materials, we explain in Argument I.A why Industry Petitioners proceed from a fundamentally incorrect premise. We then turn in Argument I.B to Industry Petitioners’ general and “as applied” arguments regarding Factor 3, and in Argument I.C to Industry Petitioners’ and Amici’s arguments regarding Factor 4. We close the argument on the legitimacy definition by addressing in Argument I.D Industry Petitioners’ and Amici’s argument that the record does not support applying the legitimacy definition to the pre-2008 exclusions, and in Argument I.E Industry Petitioners’ argument that EPA unlawfully applied the legitimacy definition to the used oil exclusion.

⁴ Revert is “partly-refined pieces of copper that are fed back (“reverted”) into the smelting process.” Industry Pet. Br. 26. Weak acid is a by-product of the gases generated during the smelting process. *Id.* at 29.

A. The Codified Legitimacy Definition Does Not Regulate Non-Discarded Materials.

Industry Petitioners argue that EPA cannot use the legitimacy test to impose conditions on secondary materials that are being recycled in a continuous or ongoing industrial process. Industry Pet. Br. 16-18. But EPA is not imposing conditions on secondary materials that are actually being recycled. The factors in the legitimacy test are what determines whether the secondary materials are being “recycled” in the first place. This Court has found that secondary materials that are legitimately being recycled in a continuous process are not discarded. However, secondary materials that are not actually being recycled, *i.e.*, that fail the legitimacy test, are being discarded, even if they move in a continuous process.

That is perfectly consistent with EPA’s longstanding position that “if a facility is engaged in sham recycling, this, by definition, is not real recycling and that hazardous secondary material is being discarded and is a solid waste.” 80 Fed. Reg. at 1720/2 (JA0291). It is also perfectly consistent with *AMC I*, with *ABR*, and although Industry Petitioners fail to mention it, with *Solvay*.

AMC I held that secondary materials that are recycled in a continuous or ongoing production process are not “discarded” and thus are not solid or hazardous waste, 824 F.2d at 1186, and *ABR* held that a continuous or ongoing process can include storage of materials prior to recycling. 208 F.3d at 1053; *id.* at 1052 (rejecting argument that continuous means “no interdiction in time”). However, *ABR* also held

that the term “discard” is ambiguous as applied to some situations but not others. 208 F.3d at 1056. *See also API II*, 216 F.3d at 55, 57 (primary treatment of oil-bearing wastewaters to remove certain materials and to recover some oil is “cycled back into the refinery production process,” *i.e.*, a continuous industrial process, but its predominate purpose could still be discard); *AMC II*, 907 F.2d at 1186 (the term “discarded” is “marked by the kind of ambiguity demanding resolution by the agency’s delegated lawmaking powers.”). *See generally Solway*, 608 Fed. Appx. at 12 (collecting cases).

Thus, while the word “discard” itself is unambiguous, the application of that term in particular instances does give rise to ambiguity. Although EPA cannot regulate secondary material *actually* recycled in a continuous industrial process, EPA can create a test that determines whether particular materials are actually being recycled, or are in fact being discarded in the guise of recycling. For example, secondary materials that are not managed as a valuable commodity (*i.e.*, Factor 3) are not being recycled, even if they are part of a continuous industrial process, because the failure to manage a secondary material as a valuable commodity means that the material is being released to the environment, and therefore is discarded. As EPA explained in the preamble to the 2008 Rule, it is a “self-evident fact that hazardous secondary materials released to the environment are not destined for recycling or recycled in a continuous process; thus, they are part of the waste management problem.” 73 Fed. Reg. at 64,720/2 (JA0117).

In *Solvay* this Court upheld a legitimacy test as a reasonable exercise of EPA's discretion to distinguish between non-hazardous secondary materials that are not waste when used as fuels or as ingredients, and secondary materials that are discarded, and therefore are solid waste, when used in combustors. 608 Fed. Appx. at 13. Industry Petitioners do not acknowledge *Solvay's* endorsement of a legitimacy test, citing *Solvay* only in their argument regarding the 2015 Rule's exclusion for third-party recycling (the verified recycler exclusion, which we address in Argument II). But *Solvay* speaks directly to the legitimacy issue as well.

The *Solvay* case concerned an EPA rule that defined when certain non-hazardous secondary materials are solid waste. As with the 2015 Rule, the rule at issue in *Solvay* applied a legitimacy test to identify "recycled" material that could be excluded from the definition of solid waste. *Id.* at 12. The elements of that legitimacy test (referred to as criteria in *Solvay*) are identical in all relevant respects to the elements of the legitimacy test at issue here. For example, the rule at issue in *Solvay* provided that "non-hazardous secondary material must be managed as a valuable commodity." 40 C.F.R. § 241.3(d)(1)(i). Factor 3 of the legitimacy definition in the 2015 rule provides that "[t]he generator and the recycler must manage the hazardous secondary material as a valuable commodity when it is under their control." *Id.* § 260.43(a)(3). The rule at issue in *Solvay* provided that "non-hazardous secondary material must contain contaminants . . . at levels comparable in concentration to or lower than those in traditional fuel." *Id.* § 241.3(d)(1)(iii). Factor 4 of the legitimacy

definition in the 2015 Rule provides that “the product of the recycling process must be comparable to a legitimate product or intermediate.” *Id.* § 260.43(a)(4). There is no meaningful difference between the two definitions.

When Industry Petitioners do acknowledge the *Solvay* decision, in the context of the 2015 Rule’s verified recycler exclusion, they attempt to minimize and distinguish *Solvay* by asserting that it has no precedential value, that it applies only to non-hazardous secondary material, that it deals with fuels that when combusted would trigger CAA regulation, and that it ignores *AMC I*.⁵ Industry Pet. Br. 48-51. None of these purported distinctions is relevant to *Solvay*’s applicability. The fact that *Solvay* is unpublished means that the panel saw “no precedential value” in its disposition, and that it did not “satisfy any of the criteria set out in [Circuit Rule 36] subsection (a).” Circuit Rule 36(e)(1), (2). Under Circuit Rule 36(a), an opinion is published if, among other things, it resolves an issue of first impression, modifies or significantly clarifies a rule of law, calls attention to an overlooked rule of law, or criticizes or questions existing law. Thus, the *Solvay* decision has no precedential value, but only because it established nothing new and did not break any new ground. In other words, the application of a legitimacy test to a broad exclusion from the

⁵ Industry Petitioners also criticize *Solvay* for relying on *American Chemistry Council v. EPA*, 337 F.3d 1060 (D.C. Cir. 2003), which dealt with mixtures and derivatives, not the definition of “solid waste,” but that objection is specific to Industry Petitioners’ separate challenge to the transfer exclusion in Argument II and will be addressed in that context.

definition of solid waste – the very agency action that Industry Petitioners challenge here – is so uncontroversial that the *Solvay* panel felt that it was not even worth publishing the opinion.

The fact that *Solvay* involved non-hazardous secondary materials instead of hazardous secondary materials is irrelevant because the same statutory definition of solid waste applies equally to both types of materials. *See* 42 U.S.C. § 6903(27). It is also irrelevant that *Solvay* dealt with fuels that when combusted would trigger CAA regulation; Industry Petitioners assert that that is a relevant distinction, but they do not attempt to explain why that would matter. As for *Solvay* overruling or ignoring *AMC I* and other cases, the Court certainly gave no indication it was doing that.

The legitimacy definition at issue in *Solvay* was designed to distinguish between non-hazardous secondary materials that are not discarded when used as fuel or ingredients, and non-hazardous secondary materials that are discarded and thus are solid waste when used in combustors. The legitimacy definition at issue here is likewise a reasonable tool to distinguish hazardous secondary materials that are recycled, including those materials recycled in an ongoing industrial process, from hazardous secondary materials that are not legitimately recycled, and thus are wastes. The Court held in *Solvay* that EPA “reasonably exercised its discretion when it developed legitimacy criteria to distinguish non-hazardous secondary materials used as fuel or ingredients from those that are solid waste.” There is no reason for a different outcome here.

B. The Third Legitimacy Factor Does Not Require Containment Of Non-Discarded Material.

Turning to Industry Petitioners' arguments regarding specific elements of the definition of "legitimate" recycling, Legitimacy Factor 3 requires hazardous secondary materials to be managed as a valuable commodity, either by managing the secondary materials in an equally protective manner as analogous raw materials or, if there are no analogous raw materials, then by containing the secondary materials. 40 C.F.R. § 260.43(a)(3).

1. Legitimacy Factor 3 does not impose conditions on materials destined for recycling in a continuous industrial process.

Industry Petitioners repeat their argument that EPA cannot impose conditions on materials destined for recycling in an ongoing industrial process. Industry Pet. Br. 18-19. As explained above, the legitimacy definition codified in the 2015 Rule does not impose conditions on materials actually destined for recycling in a continuous or ongoing industrial process. Instead, the legitimacy test defines whether a hazardous secondary material (including in-process materials) is in fact destined for recycling (in an ongoing industrial process or otherwise), and thus is a non-waste, or whether the "recycling" is a sham to disguise discard. Industry Petitioners focus on the containment alternative in Factor 3, but EPA reasonably explained why containment is related to discard: if a hazardous secondary material is released to the environment, *i.e.*, not contained, then it can no longer be destined for recycling. 80 Fed. Reg. at

1704/2 (JA0275). *See also id.* at 1742/1 (containment is the key to determining whether a secondary material is managed as a valuable product and thus not discarded) (JA0313); 73 Fed. Reg. at 64,720/2 (it is self-evident that hazardous secondary materials released to the environment are not destined for recycling or recycled in a continuous process, thus they are part of the waste management problem) (JA0117). Factor 3 does not impose a condition on non-discarded materials; Factor 3 instead helps to define when discard occurs.

2. *ABR* does not foreclose containment as a condition.

Contrary to Industry Petitioners' assertion, Industry Pet. Br. 19, the Court in *ABR* did not foreclose the containment alternative under Factor 3, nor did it reject the manner of storage as a dividing line between waste and nonwaste. *ABR* faulted one condition of a material-specific exclusion for being too broad, because it considered any delay or interruption in an industrial process (specifically, storage on the ground for even a few minutes) to be discard. *ABR*, 208 F.3d at 1053. Factor 3 does not limit continuous industrial processes to those that involve no delays or pauses, nor does it preclude storage on the ground. Instead, Factor 3, like the other elements of the legitimacy definition, focuses on whether a secondary material is actually being recycled, or whether it is discarded by being released into the environment because it is not managed as a valuable commodity.

3. Legitimacy Factor 3 does not alter the status of Freeport's copper revert.

Industry Petitioners next argue that it is now “doubtful” whether copper revert from Petitioner Freeport McMoRan’s smelter operations could satisfy Factor 3.

Industry Pet. Br. 27. The 2015 Rule does not address the status of any particular secondary material, nor did this Court’s opinions in *AMC I* and *ABR*. *See, e.g., API II*, 216 F.3d at 56 (neither *AMC I* nor *ABR* addressed “the discard status of any of the particular materials discussed in the briefs”). There is no reason to adjudicate specific materials or processes in this petition, either. *Id.* at 59 (generators in specific cases can attempt to show that a particular secondary material is not discarded and outside of EPA’s regulatory authority under RCRA). However, if the Court were to reach the issue, Industry Petitioners’ purported concerns about the regulatory status of copper revert are baseless.

First, Industry Petitioners assert that in a 2002 inspection report, EPA determined that Freeport’s revert is copper being used as copper and thus is not discarded. Industry Pet. Br. 26. EPA does not disagree. Based on the evidence in the 2002 inspection report, EPA considered the “large reverts” to be part of the *raw material* inputs to the copper production process. Warning Letter and Certification of Violation Correction for Phelps Dodge Miami Inc. (Apr. 9, 2002) (“2002 Inspection

Report”) at 9 (JA0932). Thus, the copper reverts that Industry Petitioners refer to in their brief are not even secondary materials, and the legitimacy test does not apply.⁶

Second, even if the reverts were subject to the legitimacy test, the preamble to the 2015 Rule states several times that EPA is not revisiting prior legitimacy determinations. *See, e.g.*, JA 80 Fed. Reg. at 1720-21, 1730, 1753-54, 1765 (JA0291-0292, 0301, 0324-0325, 0336). Industry Petitioners do not explain why, notwithstanding these statements, they believe the legitimacy of Freeport’s copper revert recycling is now in doubt.

Third, even if the legitimacy of Freeport’s revert recycling were revisited, Industry Petitioners assume that revert cannot simply be managed in the same way as copper ore, because they claim copper ore is not an analogous raw material due to revert’s higher copper concentration. Industry Pet. Br. 27. Industry Petitioners ignore EPA’s explanation in the preamble to the 2008 Rule that materials “generally would not be considered analogous if their chemical makeup were very different from one another – particularly if the hazardous secondary materials contain hazardous constituents that necessitate management processes that the raw material do not – or if their physical properties are different.” 73 Fed. Reg. at 64,748/1 (JA0145).

⁶ Large reverts, sometimes called “cobble,” typically contains over 50% copper. In contrast, the copper concentration in fine reverts can range from 3% to 40%. 2002 Inspection Report at 9. Fine reverts, which Industry Petitioners do not discuss, are by-products and are hazardous secondary materials, but in the Report EPA determined that the fine reverts are legitimately recycled. *Id.* at 10.

Industry Petitioners do not explain why revert's higher copper concentration would necessitate different management processes, disqualifying ore as an analogous raw material.

Fourth, Industry Petitioners assert that “nothing constrains EPA from asserting that copper revert is not ‘contained,’” because containment requires storage in a “unit” whereas the revert is stored on the ground. Industry Pet. Br. 28. Industry Petitioners misread the regulations, because the definition of “contained” specifically allows hazardous secondary materials to be stored in a “land-based unit.” 40 C.F.R. § 260.10. A “land-based unit” is simply an area where hazardous secondary materials are placed in or *on the land* before recycling. *Id.* (emphasis added). Although the definition of “contained” does preclude continuing or intermittent releases of hazardous secondary materials, the preamble to the 2015 Rule explains that some runoff is allowed, so long as the secondary material itself is not washed away. 80 Fed. Reg. at 1746/1 (“certain units may be subject to occasional precipitation runoff that consists essentially of water, with trace amounts of hazardous constituents”) (JA0317); *id.* at 1746/2 (“we agree with those commenters who argue that most units will suffer a release at some point and that it would be unreasonable to categorically classify any release of whatever nature as discard.”) (JA0317). Thus revert may be “contained” when stored on the ground as long as it is not washed away or otherwise released into the environment.

Fifth, Industry Petitioners argue that even if Freeport's current method of handling revert is considered to be in a "unit," the definition of "contained" requires the unit to have a label or continuous logging, and "continuous documentation." Industry Pet. Br. 28-29. Neither the definition of "contained" nor Factor 3 has a "continuous documentation" requirement. Containment simply requires the storage area to be "properly labeled or otherwise [have] a system (such as a log) to immediately identify the hazardous secondary materials in the unit." 40 C.F.R. § 260.10. In other words, a facility must be able to identify the material that it claims is destined for future recycling. Industry Petitioners have not shown that Factor 3 imposes conditions on materials actually destined for recycling in a continuous industrial process, that Factor 3 is inconsistent with *ABR* or any other precedent, or that Factor 3 changes EPA's assessment of whether Freeport legitimately recycles its copper revert.

C. The Fourth Legitimacy Factor Does Not Prescribe The Chemical Composition Of Non-Discarded Products.

Factor 4 requires the product of the recycling to be comparable to a legitimate product, which is essentially the same as the "identity principle" that the Court in *Safe Food* found to be a reasonable tool for distinguishing products from waste. 350 F.3d at 1269 (finding it "eminently reasonable" to treat materials as non-waste products if they are "indistinguishable in the relevant respects," and that the "identity principle,

when used in conjunction with indicators like market valuation and management practices, is a reasonable tool for distinguishing products from wastes”).

It is reasonable to consider elevated hazardous constituents or characteristics in a recycled product to be an indicator that hazardous secondary material is being discarded in the guise of recycling. As EPA explained,

[a] product that contains high levels of hazardous constituents that originate in a hazardous secondary material feedstock could indicate that the recycler incorporated hazardous constituents into the final product when they were not needed to make that product effective as a way to avoid proper disposal of that material, which would be sham recycling. This factor, therefore, is designed to determine when toxics that are “along for the ride” are discarded in a final product and the hazardous secondary material is not being legitimately recycled.

Revisions to the Definition of Solid Waste Final Rule, Response to Comments Document, Summaries and Responses (December 10, 2014) (“RTC”) at 147 (JA1108).

For example, without Factor 4, a company could dispose of lead-contaminated foundry sand by selling it as children’s play sand; Factor 4 prevents the potentially hidden discard of the lead because the lead-contaminated sand is not comparable to play sand made with uncontaminated sand. This precise fact pattern was documented in a case where approximately 375 tons of lead-contaminated foundry sand was bagged and sold as play sand over an 8-month period in 1997 and 1998 to approximately 40 different retailers throughout Georgia, Virginia, North Carolina and South Carolina. *See* Damage Cases from Recycling of Hazardous Secondary Materials,

Appendix 1 at 1-129 (EPA-HQ-RCRA-2010-0742-0370) (JA1027). Factor 4 is designed to prevent this type of discard via sham recycling. 80 Fed. Reg. at 1729/3 (JA0300).

A company can demonstrate that the product of recycling is comparable to a legitimate product under Factor 4 in several ways. If there is an analogous product made from raw materials (as was the case in *Safe Food*), the product of the recycling is comparable if it does not have any different hazardous characteristics, and if the concentration of hazardous constituents is either comparable to concentrations in analogous products or meets widely recognized commodity standards and specifications that address those hazardous constituents. 40 C.F.R. § 260.43(a)(4)(i).

In the alternative, if there is no analogous product made from raw materials, the product of the recycling is comparable if it meets widely recognized commodity standards and specifications, or if the hazardous secondary materials are being returned to the original process. *Id.* § 260.43(a)(4)(ii).

If neither alternative is met, the recycling can still be legitimate if the company performing the recycling documents why the recycling is legitimate, certifies that it is legitimate, and notifies EPA of the recycling activity. *Id.* § 260.43(a)(4)(iii).

In Argument I.C.1 through I.C.4, we rebut Industry Petitioners' four reasons why Factor 4 exceeds EPA's statutory authority. Industry Pet. Br. 20-25. In Argument I.C.5, we next address Amici's arguments, which largely duplicate Industry Petitioners' challenges to Factor 4. We close in Argument I.C.6 by turning to

Industry Petitioners' attempt to show that Factor 4 is unlawful when applied to a specific hazardous secondary material, in this case weak sulfuric acid from Freeport's copper smelting operations. Industry Pet. Br. 29-34.

1. Factor 4 does not force industry to change its production processes.

Industry Petitioners first criticize the options in Factor 4, 40 C.F.R. § 260.43(a)(4)(i), that allow a company to demonstrate that the product of the recycling is comparable to an analogous legitimate product. Industry Pet. Br. 20-22.

a. EPA does not select the analogous product.

According to Industry Petitioners, Factor 4 allows EPA to select an analogous product with different chemical composition or hazardous characteristics. Industry Pet. Br. 21. However, EPA does not make that selection. For example, companies that perform their own recycling according to the generic exclusion for recycling performed on-site under the generator's control must document how each legitimacy factor is met. 40 C.F.R. § 261.4(a)(23)(ii)(E). But EPA does not perform this analysis for the company. Rather, the company makes its own legitimacy determination. *See, e.g.*, 80 Fed. Reg. at 1756/3 (JA0327); 73 Fed. Reg. at 64,748/2 ("the person making the determination" should compare the product of the recycling with "analogous products that are made without hazardous secondary materials") (JA0145).

b. Factor 4 is not burdensome.

Industry Petitioners next argue that it is burdensome to sample and analyze down to the single part per million range a company's own products as well as its competitors' products. Industry Pet. Br. 21 n.6. First, EPA never said that a single part per million is the threshold. Industry Petitioners cite 80 Fed. Reg. at 1727 (JA0298), but there EPA gives as an example a virgin solvent with no detectable barium and a reclaimed solvent with "a minimal amount of barium (*e.g.*, 1 ppm)," which likely would be comparable. This is just one example, not a threshold. EPA gives other examples, such as a 5% difference in lead levels that "would be considered comparable since they are within a small acceptable range." *Id.* at 1727/2.

More importantly, EPA said that companies generally do not have to analyze their products and their competitors' products. 80 Fed. Reg. at 1756/3 ("testing of the recycled product is generally not required") (JA0327). As EPA explained, the "testing that the commenters refer to would only be necessary if a generator does not know the contents of either their feedstock or their product, in which case testing to acquire that information is critical to make sure that unnecessary toxic constituents are not ending up in commercial products." RTC at 158-159 (JA1119-1120). *See also id.* ("generators can use their knowledge of the product and the process to make a determination regarding factor 4. EPA has determined that in general, generators know what is in the materials they use to produce their products and they know what it is in the products they are selling on the market to the public or to other industries.

Generators are best equipped to have the knowledge of what is in these materials, since they are making them.”).

Furthermore, if the recycling process either incorporates the hazardous secondary material back into the process from which it was generated, or results in a product that meets widely-recognized commodity standards and specifications and has no analogous product, Factor 4 does not even require any consideration of the level of hazardous constituents. In either of those situations, the recycling automatically meets Factor 4. RTC at 158-159 (JA1119-1120).

c. Factor 4’s reference to commodity standards and specifications is not restrictive.

Industry Petitioners assert that Factor 4 allows EPA to select the most restrictive commodity standards and specifications, which may not even exist because commodity standards and specifications usually do not address levels of impurities. Industry Pet. Br. 21-22. As noted above, the definition is self-implementing, and EPA does not select which standards are appropriate to use (although EPA could bring an enforcement action if EPA believes there is discard in the guise of recycling). In addition, Factor 4 allows a wide degree of flexibility. The commodity standards and specifications must be “widely recognized,” such as those issued by ASTM, and if the product in question is a specialty product that does not have widely-recognized standards, then even specifications provided by a customer will suffice. 80 Fed. Reg.

at 1727/3 to 1728/1 (JA0298-0299). This hardly constrains a company to the most restrictive standards possible.

And, to the extent existing standards or specifications do not address hazardous constituents, a company can compare its product made from hazardous secondary materials to products made from raw materials. If there is no such analogous product, then the company can use standards that do not address hazardous constituents. 80 Fed. Reg. at 1728/2-3 (JA0299).

2. Factor 4 does not allow EPA to impose de facto ceilings on the chemical composition of products.

Industry Petitioners next criticize the options for demonstrating that the product of the recycling is comparable to a legitimate product where there is no analogous product, again asserting that EPA can select the most restrictive commodity standards and specifications, thus imposing a ceiling on chemical constituents. Industry Pet. Br. 22. As explained above, however, EPA does not select the relevant commodity standards or specifications. 80 Fed. Reg. at 1756/3 (JA0327). Furthermore, any widely-recognized standard, such as those established by ASTM, will suffice. 80 Fed. Reg. at 1728/2 (JA0299). This is hardly an EPA-imposed ceiling on the constituents in a product.

3. Factor 4 does not presume recycling is illegitimate if the hazardous secondary material is not returned to the original process from which it was generated.

Industry Petitioners next argue that Factor 4 violates *AMC I* and *ABR* because legitimate recycling can involve hazardous secondary materials that are reused in a different industrial process from the process that created them, whereas Factor 4 is limited to hazardous secondary materials that are returned to their original process. Industry Pet. Br. 22-23. This misreads Factor 4.

EPA agrees that recycling can be legitimate even if the hazardous secondary material is not returned to the original process. In fact, EPA rejected a suggestion that the generator-controlled exclusion should be limited to on-site continuous processes, noting that recycling that occurs on-site but in a different process does not necessarily involve discard. 80 Fed. Reg. at 1743/1 (JA0314). The portion of Factor 4 about which Industry Petitioners are concerned does not say that *only* hazardous secondary materials that are returned to their original process can be legitimate recycling. Instead, that is simply one of several ways to show that the product of recycling is comparable to a legitimate product.

As explained in Argument I.A above, simply asserting that a hazardous secondary material is recycled in a continuous process does not fully answer the discard/no discard issue. EPA has the discretion to create a test that determines whether materials are in fact destined for recycling in a continuous industrial process,

or otherwise legitimately recycled. In-process materials would be wastes if the recycling is in reality a sham to disguise discard.

4. Factor 4's alternative option is reasonable.

Industry Petitioners' fourth general argument regarding Factor 4 is that the option in 40 C.F.R. § 260.43(a)(4)(iii), which specifies when a material can meet Factor 4 even if the levels of hazardous constituents are not comparable, is not tied to "discard" because that option requires an examination of the risk posed by the hazardous secondary materials, and is "illusory." Industry Pet. Br. 24-25.

a. The risk posed by hazardous constituents in recycled products is relevant to discard.

The risk to human health and the environment posed by the product of recycling is relevant because that risk can be used to determine if the hazardous constituents in the recycled product have been discarded, or if the differences in concentrations between the contaminants in the recycled product and the analogous product are not significant. For example, in *Safe Food* EPA had set specific "exclusion limits" for metals and dioxins in fertilizers, and those limits were "higher – sometimes considerably higher – than the highest level found in . . . virgin commercial fertilizer samples." 350 F.3d at 1269. The Court held that "affirmance of the EPA's [identity] principle," which underlies Factor 4, does not require "literal identity, so long as the differences are so slight as to be substantively meaningless." *Id.* at 1270. The Court explained that the "proper perspective" for evaluating the differences is "a perspective

based on health and environmental risks.” *Id.* The Court upheld the exclusion levels despite the lack of absolute identity in the levels of metals as well as dioxins. *See, e.g., id.* at 1271 (“in the absence of any indication of health and environmental risks, it was hardly unreasonable for the EPA to treat 8 [parts per trillion] and 1 ppt as ‘identical’ enough to support a finding that recycled materials with 8 ppt dioxin are products rather than ‘discarded’ wastes”).

Industry Petitioners argue that the risk assessment referenced in the alternative option in Factor 4 has no relation to discard. In support, they cite *ABR*, 208 F.3d at 1051, Industry Pet. Br. 24, but *ABR* did not discuss risks to human health or the environment in any way. *ABR* focused on EPA’s flawed interpretation of *AMC I*, that recycling is part of a continuous industrial process “if and only if [the recycling] is continuous in the sense that there is no interdiction in time.” 208 F.3d at 1052 (internal quote omitted). The *ABR* court did not consider whether or not the risk posed by hazardous constituents in recycled products is relevant to discard.

Industry Petitioners focus on one particular type of risk, the bioavailability of hazardous constituents, and argue that it is irrelevant to discard because some medicines are valuable precisely because their constituents are bioavailable. Thus, a pill made with recycled solvent should not be considered waste based on the bioavailability of its hazardous constituents when the constituents in the same pill made with virgin solvent would be equally bioavailable. Industry Pet. Br. 25 and n.10.

This hypothetical situation, in which a pharmaceutical company recycles spent solvents (which would otherwise be considered hazardous waste) into its product rather than using virgin solvents, is a highly unlikely one. Even accepting industry's hypothetical for the sake of argument, Industry Petitioners mischaracterize how the legitimacy test would apply. The bioavailability of a hazardous constituent is only an issue under Factor 4 if the recycled product is not comparable to a legitimate product. In other words, if a pharmaceutical were made from a spent solvent and as a result that pharmaceutical has higher levels of bioavailable hazardous contaminants than pharmaceuticals made from virgin solvents, that would be sham recycling (*i.e.*, the hazardous constituents have been discarded into the product), unless the company could otherwise show under 40 C.F.R. § 260.43(a)(4)(iii) that the recycling is legitimate.

b. Factor 4's alternative option is not illusory.

Industry Petitioners assert that any flexibility under the alternative option in Factor 4 is illusory because there is no guarantee that EPA will agree that a recycling process that fulfills all of the alternatives' requirements is legitimate. Industry Pet. Br. 25. Industry Petitioners fail to explain how this is different from any other self-implementing solid waste determination. There is always the possibility that EPA might disagree with a generator's or recycler's assertion that a hazardous secondary material is not a waste, but that fact says nothing about the reasonableness of the underlying criteria that guide that determination. Furthermore, if a company is

uncertain, it can obtain from EPA a non-waste determination that a material is indistinguishable in all relevant aspects from a product. 40 C.F.R. § 260.34(c).

5. Amici's arguments are either waived, duplicate Industry Petitioners' arguments, or are wrong on the merits.

Most of Amici's arguments duplicate arguments that Industry Petitioners make, and are addressed elsewhere. The only new arguments that Amici raise are that Factor 4 improperly goes beyond intentional adulteration, and that it is impermissibly vague. The Court cannot consider the adulteration argument because it was not raised during the rulemaking, and the Court should reject the vagueness argument on its merits.

a. Amici's argument regarding extraneous constituents is waived, and is incorrect.

According to Amici, only the intentional addition of non-comparable hazardous constituents should disqualify a recycling process from being legitimate recycling. Amici Br. 17-21. Amici refers to this as "adulteration," citing *API II* as support.

As an initial matter, this was not raised in any comments during the rulemaking. Failure to raise an argument during the rulemaking process waives the argument. *City of Portland, Oregon v. EPA*, 507 F.3d 706, 710 (D.C. Cir. 2007) ("Because neither [amicus] nor any other party raised this argument before the Agency during the rulemaking process, however, it is waived, and we will not consider it.").

Even if the Court were to reach the argument, Amici are wrong. First, Amici mischaracterize *API II* as support for their argument that only the intentional addition of a hazardous secondary material renders a recycled product a waste. That case actually stands for just the opposite proposition, *i.e.*, that an intentional addition is not necessary. In *API II*, Industry challenged EPA's authority to regulate petrochemical recovered oil "under any circumstances," arguing that it is not discarded. 216 F.3d at 59. EPA excluded the oil from the definition of solid waste, but only if there were no "unneeded materials present" in the oil; *i.e.*, hazardous materials that "provide no benefit to the industrial process." *Id.* at 58. The Court noted that if oil with these extra materials were allowed, then the exclusion "would allow for the improper disposal of waste materials through adulteration." *Id.* However, EPA did not have to demonstrate that an intentional addition "actually occurs." *Id.* Instead, the mere presence of unexpected materials in some samples was sufficient to disqualify the "adulterated" oil from the exclusion. *Id.* There is no indication that the adulteration must come from intentional addition of a contaminant.

Second, discard does not require the intentional addition of extraneous constituents. Amici asserts that industrial processes "often pick up trace levels of chemicals they come in contact with" and that manufacturers will be "certain" to remove all extraneous constituents from material they recycle. Amici Br. 16. But the rule is designed to determine whether those very chemicals "picked up" in the industrial process, and their amounts, are wastes or not. Moreover, if a manufacturer

is making an effort to remove *some* extraneous constituents but not others, that manufacturer is intentionally leaving the other hazardous constituents behind. Extraneous hazardous constituents can be discarded whether they are intentionally added to a hazardous secondary material, or whether they happen to be in a hazardous secondary material and the recycler makes no effort to remove them.

Third, if (as Amici suggest) only very low levels of hazardous constituents remain in a product of recycling, then the recycling may still meet Factor 4 if those levels are comparable to analogous products, or, if there is no analogous product, then if the product of the recycling meets widely-recognized commodity standards and specifications. Amici are hypothesizing a problem that might not actually exist, and the Court should not reach for a solution in the context of the challenges to the 2015 Rule.

b. Legitimacy Factor 4 is not vague.

According to Amici, the 2015 Rule fails to provide fair notice of EPA's interpretation of terms such as analogous, similar, widely-recognized, returned to original process, comparable level of concentration, and significant risk. Amici Br. 26-28.

An agency cannot penalize a private party for violating a regulation without providing adequate notice of its substance. *Howmet Corp. v. EPA*, 614 F.3d 544, 553 (D.C. Cir. 2010). Fair notice requires that parties subject to a regulation be able “to identify, with ascertainable certainty, the standards with which the agency expects the

parties to conform.” *Id.* at 553-54. Fair notice can be provided by the text of the regulation and by guidance. *Id.* However, an agency is not required to “address every conceivable question,” but can “flesh out its rules through adjudications and advisory opinions.” *Shays v. FEC*, 528 F.3d 914, 930 (D.C. Cir. 2008), *citing Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 96 (1995).

EPA explained each of Factor 4’s elements in detail, and provided numerous examples. 80 Fed. Reg. at 1725-30 (JA0296-0301). In addition, in the preamble to the 2008 Rule, EPA explained that the “decision not to include specific bright-line tests for the final legitimacy factors reflects the fact that legitimacy determinations do not lend themselves to the application of absolute distinctions, especially given the breadth of recycling practices and recycled hazardous secondary materials that exist in industry.” 73 Fed. Reg. at 64,745/1 (JA0142); *see also id.* (“In addition, we believe that legitimacy determinations are best made on a case-by-case basis, which has always been the case, with the facts of a specific situation in hand.”).

The detailed explanation EPA provided in the preamble is more than sufficient to provide fair notice to the regulated community.

c. Legitimacy Factor 4 does not affect closed loop recycling.

Amici also argues that recycled solvents may no longer be excluded, even under the closed loop exclusion, if the recycling fails Factor 4, Amici Br. 23-25, but closed loop recycling automatically meets Factor 4. *See* 40 C.F.R. § 260.43(a)(4)(ii)(B).

6. Legitimacy Factor 4 does not alter the status of Freeport's weak acid.

Similar to the arguments addressed in Argument I.B.3, above, Industry Petitioners argue that Factor 4 “appears to deem” Freeport’s weak acid a waste. Industry Pet. Br. 30-31. As we explained in Argument I.B.3 in the context of Factor 3, the 2015 Rule does not address the status of any particular secondary material, nor should the Court in this petition. However, as with Industry Petitioners’ assertions about the regulatory status of Freeport’s copper revert, their concerns about Freeport’s weak acid lack merit.

Industry Petitioners argue that Factor 4 allows EPA to select a weak acid from other feedstocks with different constituents as the analogous product, despite the 2002 inspection report finding that Freeport’s recycling of the weak acid is legitimate. Industry Pet. Br. 30-32. Industry Petitioners also assert that because weak acid is used in heap leaching, and not returned to the original process that generated it, it is unclear whether the weak acid would still be considered legitimately recycled. *Id.* at 33. And Industry Petitioners argue that the document/certify/notify alternative to Factor 4 provides no assurance EPA will agree that the process is legitimate recycling, and that in any event the recycler must still comply with labeling and documentation requirements. *Id.* at 33-34.

As noted above, the preamble to the 2015 Rule states several times that EPA considers the codified definition of legitimate recycling to be substantively the same as

the legitimacy policy, and is not revisiting prior legitimacy determinations. *See, e.g.*, 80 Fed. Reg. at 1720-21, 1730, 1753-54, 1765 (JA0291-0292, 0301, 0324-0325, 0336). Industry Petitioners do not explain why, notwithstanding these statements, they believe EPA's 2002 determination regarding the legitimacy of Freeport's weak acid recycling is now in doubt.

Even if the legitimacy of recycling the weak acid into the copper heap leaching piles were considered anew, Industry Petitioners have not demonstrated that the legitimacy test would result in non-discarded materials being regulated. Based on the information in the 2002 Inspection Report, the weak acid would meet the regulatory definition of "sludge" and could also be considered a "by-product." Its use in reclaiming copper from heap leaching piles therefore must meet the legitimacy test. *See* 2002 Inspection Report at 18 n.13 (JA0941). For Factor 4, the constituent comparison is made with the product of the process – in other words, the copper product. "It is important to note that the comparison that EPA is requiring here involves the product that comes out of a recycling process." 80 Fed. Reg. at 1726/3 (JA0297). Under 40 C.F.R. § 260.43(a)(4)(ii)(A), as long as the copper product met commodity grade specifications, then Factor 4 would be met.

In contrast, if the same weak acid were used in a different manner, a different legitimacy determination could result. To continue with Industry Petitioners' previous hypothetical example, if the weak acid were used as a substitute for commercial acid in pharmaceutical manufacturing, the company would need to verify that the toxic

constituents in the weak acid do not result in higher levels of hazardous constituents in pharmaceuticals than would occur with the use of commercial-grade acid.

As for EPA's ability to select a different weak acid from other feedstocks with different constituents, we explained in Argument I.C.1.c, above, EPA does not make a selection for every company and hazardous secondary material; instead, the definition is self-implementing. In addition, the commodity standards and specifications must be "widely recognized," such as those issued by ASTM, and even specifications provided by a customer will suffice. 80 Fed. Reg. at 1727/3 to 1728/1 (JA0298-0299). The generator of the hazardous secondary material would select the relevant specifications in the first instance, not EPA (although EPA could disagree with the generator's selection and bring an enforcement action if EPA believes there is discard in the guise of recycling).

Industry Petitioners claim in passing that EPA could apply Factor 4 to commercial-grade sulfuric acid. Industry Pet. Br. 54. As Industry Petitioners note, the Agency already determined this acid to be a co-product, which is not a hazardous secondary material and therefore not be subject to the legitimacy test. Nothing in the 2015 Rule changes that fact.

Industry Petitioners have not shown that Factor 4 exceeds EPA's statutory authority, that Factor 4 should be limited to extraneous hazardous constituents intentionally added to a secondary material, that Factor 4 is vague, or that Factor 4 casts any doubt on whether Freeport legitimately recycles its weak acid.

D. The Administrative Record Supports Applying The Codified Legitimacy Test To The Pre-2008 Exclusions.

EPA has always applied a legitimacy test to all recycling exclusions, including the pre-2008 exclusions. *See* 80 Fed. Reg. at 1720/2 – 1722/3 (explaining that “the agency has always enforced its rules on the basis that any recycling must be legitimate” and that the codified legitimacy test is “substantively the same as the existing legitimacy policy”) (JA0291-0293). Industry Petitioners and Amici argue that if EPA does not have sufficient information to justify adding containment and notification conditions, EPA cannot have sufficient information to justify applying the codified legitimacy definition. Industry Pet. Br. 34-35; *see also* Amici Br. 23-26. But the legitimacy definition is different from the containment and notification conditions. EPA is not requiring any recyclers or generators to revisit their past legitimacy determinations; if a process was legitimate under the guidance, there is no change in its status. EPA is simply confirming that the legitimacy definition applies, making it easier to use by codifying it, and adding flexibility to it. 80 Fed. Reg. at 1753-54; 1765 (JA0324-0325, 0336).

Industry Petitioners point to EPA’s statement in a Frequently Asked Questions document that the record is inadequate to support the imposition of across-the-board conditions. *See* 2015 Definition of Solid Waste Final Rule, Frequent Questions (March 30, 2015) at 4 (JA1165). But EPA went on to address why EPA required the pre-2008 exclusions to comply with the codified legitimacy test, and did not require

the pre-2008 exclusions to comply with the codified definition of contained or with the notification requirement. *Id.* at 5 (JA1166). EPA explained, as it did in the preamble, that the pre-2008 exclusions always had to comply with the legitimacy requirement, even though those exclusions did not “specifically require a demonstration of legitimacy.” *Id.* In contrast, as discussed in Argument V, below, EPA deferred action on “adding new across-the-board conditions to the pre-2008 recycling exclusions” in order to “take[] into account the specifics of each exclusion and the potential for unintended consequences and difficulty in implementing certain requirements.” *Id.* at 4 (JA1165).

E. EPA Did Not Apply The Codified Legitimacy Test To The Used Oil Exclusion.

The used oil exclusion states:

Used oil that is recycled and is also a hazardous waste solely because it exhibits a hazardous characteristic is not subject to the requirements of parts 260 through 268 of this chapter, but is regulated under part 279 of this chapter.

40 C.F.R. § 261.6(a)(4). The legitimacy test is codified in 40 C.F.R. § 260.43, and the prohibition on sham recycling in 40 C.F.R. § 261.2(g). Thus, the used oil exclusion explicitly states that it is not subject to either of those provisions. This language is unique among the exclusions in sections 261.4(a) and 261.6. Industry Petitioners argue that the 2015 Rule applies the legitimacy test codified in 40 C.F.R. § 260.43 to the used oil exclusion found in 40 C.F.R. § 261.6(a)(4) without prior notice, and in violation of 42 U.S.C. § 6935(a). Industry Pet. Br. 35-36. However, they are wrong

for the simple reason that the 2015 Rule does not apply the codified legitimacy test to the used oil exclusion.

While section 260.43(a) is broadly worded, *i.e.*, it states without limitation that “for the purpose of the exclusions or exemptions from the hazardous waste regulations,” recycling must be legitimate, that general provision must be read in conjunction with the more specific provision that governs used oil, *i.e.*, section 261.6(a)(4). Industry Petitioners point out that in 2011 EPA proposed to apply the codified legitimacy text to a list of 32 specific pre-2008 exclusions, and that the exclusion for used oil in section 261.6(a)(4) was not listed. The fact that section 261.6(a)(4) was not listed in the 2011 proposal is not a failure to provide notice that EPA was considering requiring that exclusion to comply with the legitimacy test codified in section 260.43. Rather, it is additional evidence that EPA did not, and does not, intend for section 260.43 to apply to section 261.6(a)(4).

In sum, the third and fourth legitimacy factors are well within EPA’s statutory authority under RCRA, are consistent with this Court’s decision in *Solway* upholding a functionally identical legitimacy test, are consistent with this Court’s prior precedents on the definition of solid waste, and the record supports applying the codified legitimacy test to the pre-2008 exclusions.

II. INDUSTRY PETITIONERS' CHALLENGES TO THE VERIFIED RECYCLER EXCLUSION LACK MERIT.

As we explained in the Statement of the Case, the verified recycler exclusion differs from the 2008 Rule's version of the transfer-based exclusion in two respects. First, the 2015 Rule adds requirements for generators to comply with emergency preparedness and response conditions. Second, under the 2008 Rule, a generator could only send its hazardous secondary material off-site to three types of third-party recyclers: those that possessed a RCRA permit, those that possessed interim status, and those that had been audited by the generator to ensure that the secondary materials would be managed properly and legitimately. The 2008 Rule defined in detail the "reasonable efforts" generators had to make in performing these audits, listing five specific aspects of the third-party recycler that the generator must examine, ranging from the legitimacy of the off-site operation, to the recycler's financial and compliance status. The 2015 Rule removes from the generator the burden of conducting a "reasonable efforts" audit. Instead, if a third-party recycler does not have either a RCRA permit or interim status, the recycler must obtain a variance under a new provision, section 260.31(d). This new provision largely requires the same information as the audit that the generator was required to perform under the "reasonable efforts" provision, but makes the process more transparent.

Industry Petitioners make two arguments. First, they assert that EPA made a "broad presumption" that transfers constitute discard. Industry Pet. Br. 37; 36-51.

Second, they assert that the 2015 Rule unlawfully imposes additional conditions on transferred materials, beyond what is necessary to ensure that those materials are not discarded (and that EPA arbitrarily repealed the 2008 version of the transfer-based exclusion). Industry Pet. Br. 51-58.

A. The 2015 Rule Reasonably Defines When Hazardous Secondary Materials Transferred To Third-Parties Are Discarded.

Industry Petitioners give four reasons why the 2015 Rule unlawfully presumes that a transfer of hazardous secondary material constitutes discard. Before considering Industry Petitioners' arguments, we note that Industry Petitioners are not seeking vacatur of the transfer-based exclusion in its entirety. Rather, Industry Petitioners support the 2008 version of that exclusion, and challenge only the changes made by the 2015 Rule. Industry Pet. Br. 66 (seeking vacatur of only the provisions of the transfer-based exclusion that were added in the 2015 Rule, not the provisions that were first adopted in the 2008 Rule). But the 2008 version and the 2015 version both presume that transfers to third-parties for off-site recycling are more likely to involve discard than are recycling activities conducted within the generator's control. Industry Petitioners had no quarrel with that presumption in 2008. *See, e.g.*, Industry Pet. Br. 56 (asserting that "EPA's repeal of the [2008] transfer-based exclusion" was arbitrary and contrary to RCRA). The revisions EPA made in the 2015 Rule have nothing to do with the underlying determination regarding the nature of transfers to third-party recyclers. It is inconsistent for Industry Petitioners to contest a

presumption in the 2015 Rule when that presumption equally underlies the 2008 exclusion, which Industry Petitioners seek to preserve.

Turning to Industry Petitioners' specific arguments, they assert that a presumption regarding transfer conflicts with this Court's precedent, is not supported by the record, and conflicts with prior agency practice. Surprisingly, Industry Petitioners leave for last their argument that this Court's decision in *Solvay* "does not govern." Industry Pet. Br. 48. Rather than end with *Solvay*, that is where the analysis should begin.

1. *Solvay* is not distinguishable.

In addition to upholding the application of a codified legitimacy test, as discussed in Argument I, above, *Solvay* also upheld precisely the same presumption regarding transferred materials that Industry Petitioners challenge here. In the rule at issue in *Solvay*, EPA distinguished "between material burned by the generator and material transferred to a third party." 608 Fed. Appx. at 13. This Court held that this distinction "is consistent with RCRA and reasonable." *Id.* In the 2015 Rule, EPA likewise distinguishes between material recycled by the generator and material transferred to a third party. In the rule at issue in *Solvay*, as in the 2015 Rule, EPA placed the burden upon the regulated entity to demonstrate "that its material should not be regulated." *Id.* As they do here, industry petitioners in *Solvay* asserted that this "upside down view" of transfers was contrary to RCRA. *Id.* This Court disagreed,

holding that “EPA is well within its statutory authority to assume that transferred material is solid waste until an interested party demonstrates” otherwise. *Id.*

Industry Petitioners strain to distinguish *Solvay*, and we have disposed of most of those criticisms in Argument I.A, above. As with *Solvay*’s resolution of the challenges to the legitimacy test, the fact that *Solvay* is unpublished simply suggests that in the Court’s view, the reasonableness of the presumption regarding transfers is so clear as to break no new ground. The one criticism of *Solvay* that we have not addressed is Industry Petitioners’ argument that *Solvay* erred in relying on *American Chemistry Council v. EPA*, 337 F.3d 1060 (D.C. Cir. 2003). Industry Pet. Br. 48-50. In *American Chemistry Council*, the Court upheld a rule in which EPA determined that, unless specifically delisted, mixtures containing a listed hazardous waste and residues derived from treatment of a listed hazardous waste remain listed hazardous wastes. 337 F.3d at 1065. While that case did not specifically address the definition of solid waste, it did involve the distinction between hazardous waste (which is regulated under RCRA Subtitle C) and non-hazardous waste, and is fully applicable here. The *American Chemistry Council* and *Solvay* courts both agreed that when implementing RCRA’s goal of protecting human health and the environment, EPA may require a regulated entity to demonstrate that its material should not be subject to regulation. *American Chemistry Council*, 337 F.3d at 1065; *Solvay*, 608 Fed. Appx. at 13. In *Solvay*, as in this case, EPA was faced with developing a general rule that will apply to hundreds of secondary materials, the recycling of which will, in a significant number of cases,

constitute disposal either because a material is released into the environment or because its levels of contaminants are not comparable to, and, in some cases, significantly exceed those found in legitimate products. EPA was well within its statutory authority to determine in *Sohay* that these materials should be classified as solid waste until an interested party demonstrates that the material should be classified as a product fuel. There is no reason for a different result here.

2. The 2015 Rule’s transfer-based exclusion is consistent with *Safe Food*.

Industry Petitioners point to a statement in *Safe Food*, that “firm-to-firm transfers are hardly a good indicia of a ‘discard’ as the term is ordinarily understood.” *Safe Food*, 350 F.3d at 1268. Industry Petitioners urge that this statement is part of the holding in *Safe Food*, and precludes any “broad presumption that mere transfer equals discard.” Industry Pet. Br. 38. Industry Petitioners are wrong on both counts.

First, the quoted passage is not part of the holding in *Safe Food*. The argument in *Safe Food* was that because a material destined for immediate reuse is not waste, the inverse must also be true, *i.e.*, if a material is not destined for immediate reuse, it must be waste. 350 F.3d at 1268.⁷ The Court observed that secondary materials “destined

⁷ The Court called this the converse but the starting point for the argument in *Safe Food* was: if P (if a secondary material is destined for immediate reuse in an ongoing process), then Q (it is not waste). The converse would be: if Q (if a secondary material is not waste), then P (it must be destined for immediate reuse in an ongoing process). Petitioners in *Safe Food* actually argued the inverse: if not P (if a secondary

Cont.

for future recycling by another industry *may* be considered ‘discarded’ . . . if they can reasonably be considered part of the waste disposal problem.” *Id.* But, nothing in RCRA “compels the conclusion that material destined for recycling in another industry is necessarily discarded.” *Id.* While the original statement is true (as discussed in Argument I, legitimate recycling within an ongoing industrial process is inconsistent with the “ordinary language” meaning of discard), the inverse “is not true.” *Id.* Secondary materials not destined for immediate recycling may be waste, but logic does not demand that they must be waste.

After stating the holding, the Court went on to observe that firms “have ample reasons to avoid complete vertical integration,” so “firm-to-firm transfers are hardly a good indicia of a ‘discard’ as the term is ordinarily understood.” *Id.* The Court had already concluded that the *Safe Food* petitioners’ argument “misread[s] our cases” by assuming that the inverse of the *AMC I* holding must be true. *Id.* The Court’s reference to one potential reason why the inverse is not necessarily true – the economic disincentive to complete vertical integration – is dicta.

Second, EPA is not simply making a “broad presumption that mere transfer equals discard.” Industry Pet. Br. 38. EPA also determined that, “*absent specific conditions*, it is reasonable to conclude that transfers of hazardous secondary materials to third-party recyclers generally involve discard except for instances where EPA has

material is *not* destined for immediate reuse in an ongoing process) then not Q (it is waste).

evaluated and promulgated a case-specific exclusion that a hazardous secondary material is not a solid waste.” 80 Fed. Reg. at 1707/1-2 (emphasis added) (JA0278). This is entirely consistent with *Safe Food*, which, like this case, involved a conditional exclusion for certain transfers of hazardous secondary materials for recycling. The Court relied on the conditions of the fertilizer exclusion when it upheld EPA’s determination that those hazardous secondary materials are not solid waste. 350 F.3d at 1269 (noting “the combination [of] market participants’ treatment of the materials, together with EPA-required management practices and containment limits assuring chemical identity”). As shown in the next subsection, the similar determination that EPA has made for hazardous secondary materials recycled under the 2015 transfer-based exclusion is reasonable and supported by the record.

3. Studies in the record support EPA’s presumption that transfers of hazardous secondary materials to third-parties are more likely to result in discard.

Two studies in the record support EPA’s presumption: *An Assessment of Environmental Problems Associate with Recycling of Hazardous Materials* (2014) (“Problems Study”), and *A Study of Potential Effects of Market Forces on the Management of Hazardous Secondary Materials Intended for Recycling* (2006) (“Market Study”).

EPA’s Problems Study identified 250 cases “in which environmental damages of some kind occurred from some type of recycling activity.” 80 Fed. Reg. at 1698/3 and *id.* at n.3 (JA0269). Over 90 percent of those damage cases were from the recycling activities “of off-site third-party recyclers, with clear instances of discard

resulting in risk to human health and the environment, including cases of large-scale soil and ground water contamination with remediation costs in some instances in the tens of millions of dollars.” *Id.* at 1707/2 (JA0278). This high degree of correlation between damage cases and off-site recycling supports a presumption that a transfer is more likely to result in discard than is recycling that occurs within the generator’s control.

EPA’s Market Study also supports this presumption. It explains the inherent economic differences between manufacturing and recycling, and establishes that third-party recyclers have an economic incentive to accumulate hazardous secondary materials, and less flexibility to manage such materials. 80 Fed. Reg. at 1707/2-3 (JA0278).

a. Problems Study

Industry Petitioners argue that EPA failed to address whether the fact that the Problems Study identified 250 damage cases “has any significance,” Industry Pet. Br. 39, because the study did not compare that number to the total number of facilities engaged in recycling. *Id.* at 40. Industry Petitioners also argue that EPA failed to respond to comments on the Problems Study. *Id.* at 42-43. However, the percentage of recycling sites with damage is not the relevant information in the Problems Study, because there is no “acceptable” rate of environmental damage from discarded hazardous secondary materials. Instead, the value of the Problems Study lies in its confirmation of a pattern of damages linked to discard, and specifically to off-site

recycling. As EPA explained, “the occurrence of certain types of environmental problems associated with post-1982 recycling practices shows that discard has occurred.” 80 Fed. Reg. at 1698/3 (JA0269).

Although Industry Petitioners concede that over 90 percent of the damage cases involved transfer-based recycling, they argue that EPA failed to demonstrate that off-site recycling is any riskier than on-site recycling, because, they surmise, on-site recycling may be less common, or damage cases from on-site recycling may be poorly documented. Industry Pet. Br. 41-42. Industry Petitioners ignore the fact that when recycling occurs on-site or otherwise within the control of the generator of the hazardous secondary material, the generator maintains “control over, and potential liability for, the recycling process.” 80 Fed. Reg. at 1704/1 (JA0275). This “ensures that the hazardous secondary materials are not discarded.” *Id.* Thus, the Problems Study not only supports a presumption that transfer is more likely to result in discard, but the high percentage of third-party recycling damage cases in the Problems Study also corroborates EPA’s determination that the 2008 Rule’s version of the transfer-based exclusion requires more conditions in order to ensure that hazardous secondary materials are not discarded. That is precisely what EPA did in the 2015 Rule.

Industry Petitioners also argue that the Court cannot uphold the 2015 Rule without the Problems Study. Industry Pet. Br. 43-44. Industry Petitioners rely on *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319 (D.C. Cir. 2006), but in that case FERC had based its decision to assert regulatory jurisdiction on two

separate rationales: that FERC's prior decision rejecting regulatory jurisdiction was based on incomplete information, and a factual finding regarding the specific pipeline at issue. *Id.* at 325. The Court held that the "incomplete information" rationale was not explained in the agency decision, and because courts can only uphold agency action on the theory the agency itself articulated, that rationale could not support the agency's decision. *Id.* at 329. Because FERC's decision did "not reveal whether FERC would have [reached the same decision] on the basis of [the factual] finding alone," the Court remanded for further explanation. *Id.* at 330.

This case is different because the Court is not faced with two different rationales, one of which is not explained by the agency. The caselaw and the record, including but not limited to the Problems Study, support placement of the burden on the regulated entity to show that its material should not be regulated. The Problems Study also corroborates EPA's rationale for requiring conditions as part of the 2015 transfer-based exclusion, but those conditions do not depend on the Problems Study.

b. Market Study

Industry Petitioners argue that there is no empirical support for the Market Study's theory that the inherent differences between recycling and manufacturing lead to a pattern of discard, because the five hazardous wastes analyzed in the Market Study are not necessarily representative of all hazardous wastes and because there is no correlation to wastes or industries beyond the five in the study. Industry Pet. Br. 44-45. However, the Market Study does not need to address every potential

hazardous waste or every waste recycling practice in order to validly demonstrate the economic incentives third-party recyclers have to speculatively accumulate, mismanage, and abandon hazardous secondary materials.

The Market Study found that, in contrast to most types of manufacturing, where revenue is generated primarily from the sale of the output, hazardous secondary materials recycling generates revenue primarily from the receipt of the hazardous secondary materials. 80 Fed. Reg. at 1707/2 (JA0278). Commercial recyclers “thus respond differently . . . to economic forces and incentives . . . than do traditional manufacturers, accumulating more inputs (hazardous secondary materials) than can be processed (reclaimed).” *Id.* See also Market Study at 36 (JA0439) (“One strategy for reducing these losses could be to continue to accept hazardous materials and the revenue stream associated with that activity, while cutting costs by engaging in improper waste management. . . . The firm may view mismanagement of waste as attractive if it believes it can avoid the true costs involved with properly handling or disposing of the materials.”). Commercial recyclers also “have less flexibility than in-house recyclers to change how they manage their hazardous secondary materials.” 80 Fed. Reg. at 1707/2-3 (JA0278). For example, during price fluctuations, in-house recyclers can more easily switch from recycling to disposal or from recycled inputs to virgin inputs, while commercial recyclers cannot switch to disposal without obtaining a RCRA permit. *Id.* See also Market Study at 37 (industrial firms “face a different situation than commercial firms due to being able to substitute away from producing

recycled materials onsite if the costs become prohibitively high for them to do so.

The industrial firms may thus have less incentive to mismanage their waste, and may also be less inclined to do so due to the liability issues discussed above. Industrial recyclers also do not have incentives to store or stockpile their waste since they do not receive any revenue from accepting waste.”) (JA0440).

In short, third-party recyclers have economic incentives to accumulate hazardous secondary materials beyond their ability to deal with it, which can lead to non-compliance even at facilities that accepted the materials for recycling with good intentions.

4. The 2015 Rule does not conflict with EPA’s historical practice.

Industry Petitioners next argue that a presumption that transfer involves discard is inconsistent with EPA’s historical practice. Industry Petitioners point out that the pre-2008 exclusions for sludges and by-products do not depend on whether those materials are recycled on-site or off-site. Industry Pet. Br. 47. They also point to EPA’s 1985 definition of solid waste, where EPA identified the material and the recycling activity as the relevant factors for defining waste, not the location of the recycling. *Id.*

Industry Petitioners are wrong because some pre-2008 exclusions do depend on the location of the recycling. *See, e.g.*, 40 C.F.R. § 261.4(a)(9) (wood preserving wastewaters and spent wood preserving solutions excluded if reused on-site); *id.* §

261.4(a)(15) (kraft mill steam stripper condensate only excluded at the mill). Also, Industry Petitioners' logic would disqualify the generator-controlled exclusion and the 2008 Rule's version of the transfer-based exclusion, both of which depend on the "location of the recycling," *id.*, yet Industry Petitioners did not challenge either of these exclusions, and they now affirmatively support the 2008 version of the transfer-based exclusion. *Id.* at 56 (arguing that EPA's "repeal of the [2008] transfer-based exclusion . . . was arbitrary and capricious"); *see also id.* at 66 (seeking vacatur of only the provisions of the transfer-based exclusion that were added in the 2015 Rule, not the provisions that were first adopted in the 2008 Rule).

And, even if Industry Petitioners were correct, the mere fact of a change in EPA's position would not make the presumption arbitrary. *FCC v. Fox Television Studios, Inc.*, 556 U.S. 502, 515 (2009) (agency must provide reasoned explanation for change in policy, but "need not demonstrate . . . that the reasons for the new policy are *better* than the reasons for the old one"). EPA reasonably explained the basis for the presumption, and Industry Petitioners' argument would preclude EPA from learning from its experience developing the definition of solid waste, and adapting as new information is learned.

B. The 2015 Rule's Transfer-Based Exclusion Does Not Impose Conditions On Secondary Materials That Have Not Been Discarded.

EPA's decision to add emergency preparedness and response planning requirements to the 2008 Rule's version of the transfer-based exclusion, and to

replace the 2008 Rule's generator-conducted environmental audit of third-party recyclers with a variance process, was reasonable. EPA based its decision on "the evidence from the states currently implementing the [2008 Rule's] transfer-based exclusions. 80 Fed. Reg. at 1706/3 (JA0277). EPA concluded that the exclusion was fulfilling its purpose of encouraging safe, legitimate recycling, so a full repeal would be unnecessary and would result in over-regulation. *Id.* at 1708/3 (JA0279). However, the 2008 Rule's version of the exclusion lacked sufficient regulatory oversight, and lacked public participation prior to the start of recycling operations at third-party facilities. *Id.* at 1708/2. The 2015 Rule's variance process, which addresses largely the same criteria as the old generator-conducted audit, allows regulators to evaluate these third-party facilities prior to the commencement of recycling operations to ensure that transferred materials will not be discarded and that potential risks to surrounding community will be minimized. *Id.* at 1709/1 (JA0280).

Industry Petitioners criticize the variance requirement, 40 C.F.R. § 261.4(a)(24)(vi)(G), asserting that it is an impermissibly vague regulatory mandate, and that regardless of how carefully a hazardous secondary material is managed, it is arbitrary to still consider it a waste unless it is sent to facility with a RCRA permit or variance. According to Industry Petitioners, transfers that meet the 2008 Rule's transfer-based exclusion, but lack a permit or variance, are not part of the waste disposal problem. Industry Pet. Br. 52-53.

The record shows that in practice the additional oversight provided by the variance will address the gaps in the 2008 Rule's transfer-based exclusion. 80 Fed. Reg. at 1711/2 (JA0282). Sixty five facilities operated under the 2008 Rule's version of the exclusion; seven of those facilities are off-site recyclers. *Id.* at 1708/2 (JA0279). No environmental problems have been reported at the seven off-site facilities, but all seven of those facilities have RCRA permits. *Id.* at 1708/2-3 (JA0279). Pennsylvania in particular, where 27 of the 65 total facilities that operated under the 2008 Rule's version of the exclusion are located, recommended that "the transfer-based exclusion be limited to RCRA-permitted facilities." *Id.* at 1708/3, 1709/1 (JA0279, 0280). Although EPA "is unable to extrapolate what would happen" at off-site facilities without RCRA permits, the evidence of past damage cases and the "perverse" economic incentives to discard hazardous secondary materials support the need for additional oversight. *Id.* at 1709/1.

Furthermore, it is more appropriate and more efficient for EPA or an authorized state to perform one evaluation of a recycler, in the variance process, than it is for each generator to undertake essentially the same environmental audit. *Id.* at 1711/2-3 (JA0282). *See also id.* at 1713/2 (the variance process addresses "the substantive criteria of the 'reasonable efforts' condition that had previously applied to the [generator]," in addition to "the potential for risk to proximate populations"). In contrast to the 2008 Rule, in which generators were required to perform a self-implementing "reasonable efforts" environmental audit of the recycler, under the

2015 Rule the generator simply needs to verify that the recycler has been granted a RCRA permit or a variance.

It is particularly surprising that Industry Petitioners, all of whom represent hazardous waste *generators*, would argue that the 2015 Rule's version of the transfer-based exclusion is impermissibly vague, yet the 2008 Rule's version of that exclusion is not, even though the 2008 Rule incorporated virtually identical terms.

Industry Petitioners also argue that the new emergency preparedness and response requirements that generators of hazardous secondary materials must comply with in order to transfer those materials off-site for recycling, are nothing more than “a regulatory mandate posing as a definition of ‘solid waste.’” Industry Pet. Br. 53-54. EPA explained that these are “common-sense steps” that generators should be taking to reduce the risks to their workers and to the public, and that generators should be complying with them independent of the transfer-based exclusion. 80 Fed. Reg. at 17111/1 (JA0282). Furthermore, these conditions “ensure that those facilities managing hazardous secondary material under the exclusion will . . . limit loss into the environment of materials that are supposed to be recycled.” *Id.* Thus, like the elements of the legitimacy definition, these conditions serve to ensure that hazardous secondary materials are not released, and thereby discarded.

Industry Petitioners incorrectly assert that the verified recycler exclusion regulates hazardous secondary materials based on the materials' potential for future discard, rather than regulating only materials that “are actually discarded.” Industry

Pet. Br. 55. In fact, the conditions of the verified recycler exclusion exist to ensure that hazardous secondary materials are not discarded in the first place. Hazardous secondary materials are, by definition, hazardous wastes if they are discarded. EPA therefore “needs adequate assurance that the conditional exclusion will not result in discarded hazardous materials posing significant risks to human health and the environment (e.g., fires/explosion, soil and water contamination, air emissions, and abandoned hazardous secondary materials).” 80 Fed. Reg. at 1707/3 (JA0278).

In their final argument regarding the verified recycler exclusion, Industry Petitioners concede that API’s challenge to the 2008 Rule’s version of that exclusion is moot, because spent petroleum refinery catalysts are eligible for the 2015 version of the exclusion. Industry Pet. Br. 58. In its prior brief in No. 09-1038, API did not challenge the conditions of the transfer exclusion, or the legitimacy factors. Apart from its disparate treatment argument, API only argued that EPA lacks statutory authority to regulate spent catalysts at all. API does not raise that argument here (and would be out of time to do so in any event, and would be wrong on the merits, as explained in EPA’s prior brief in No. 09-1038). Thus, neither API nor any other party challenges the 2008 Rule.

What API does challenge is simply a repeat of what Industry Petitioners say regarding the 2015 Rule: that the variance and emergency preparedness requirements are arbitrary and beyond EPA’s authority. Industry Pet. Br. 58. API does not offer anything new, and we have refuted above the arguments that API does make.

III. INDUSTRY PETITIONERS' CHALLENGE TO EPA'S RESPONSE TO A COMMENT ON OFF-SPECIFICATION COMMERCIAL CHEMICAL PRODUCTS LACKS MERIT.

During the 2015 rulemaking, one commenter, representing various chemical manufacturers, asked EPA to clarify whether the definition of hazardous secondary material in 40 C.F.R. § 260.10 includes commercial chemical products. EPA responded that a commercial chemical product “could be a hazardous secondary material if it is off-specification or otherwise unable to be sold as a product.” RTC at 314 (JA1146). Industry Petitioners assert that this is a change in position and is arbitrary. Industry Pet. Br. 64-65. The statement in the response to comments document is not final agency action, nor is it ripe. However, if the Court reaches the merits, Industry Petitioners are wrong because EPA has not changed its position.

A. The Court lacks jurisdiction to review a statement in a background document.

Judicial review under 42 U.S.C. § 6976(a) is limited to review of regulations, requirements, and denials of petitions to promulgate, amend or repeal a regulation. *MolyCorp v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999). EPA's response to comments document is none of these. EPA did not propose any changes to the definition of hazardous secondary material in section 260.10, nor did EPA make any changes in the final rule. The statement in the response to comments document does not “impose obligations on regulated interests or on the EPA.” *Id.* at 546. It is functionally similar to the Technical Background Document at issue in *MolyCorp*, which discussed various

commodities and their production processes, and identified “specific waste streams” from Molycorp’s own operations. *Id.* Nonetheless, the Court dismissed the petition for lack of jurisdiction, reasoning that the background document is non-binding and lacks the force of law. *Id.* at 545-46.

Industry Petitioners’ challenge is also not ripe, because “there does not exist a concrete controversy.” *Id.* at 547. As in *Molycorp*, “any enforcement proceeding . . . would be based not on the [background] document (which has no legal effect) but on the underlying . . . regulation.” *Id.*

B. EPA’s response to a comment regarding commercial chemical products is not a change in agency position.

If the Court reaches the merits, EPA’s response is not a change in position. A “hazardous secondary material” is “a secondary material (e.g., spent material, by-product, or sludge) that, when discarded, would be identified as hazardous waste under part 261 of this chapter.” 40 C.F.R. § 260.10. The term “secondary material” is not defined in 40 C.F.R. § 260.10, but it is defined for the purpose of the non-hazardous definition of solid waste in 40 C.F.R. § 241.2 as “any material that is not the primary product of a manufacturing or commercial process, and can include post-consumer material, off-specification commercial chemical products or manufacturing chemical intermediates, post-industrial material, and scrap.” Like hazardous secondary materials, commercial chemical products listed in 40 C.F.R. § 261.33 are, by definition, hazardous waste when discarded.

As Industry Petitioners explain, a commercial chemical product is a secondary material if, contrary to its normal manner of use, it is placed on land or burned as a fuel. Industry Pet. Br. 59; *see also* API Comment, EPA-HQ-RCRA-2010-0742-0175, at 44 (“under EPA’s longstanding interpretations . . . [a commercial chemical product] is not classified as a ‘secondary material’ – unless it is used in a manner different from normal use”) (JA0615).

EPA’s response recognizes that if a commercial chemical product is so far off-specification it cannot be sold as product, then it potentially cannot be used in its ordinary manner and, as EPA said, “could” be a secondary material. EPA does not believe that all off-specification commercial chemical products are secondary materials; EPA simply recognized that they *could* be, in those cases where they “cannot otherwise be sold as a product” – in other words, in cases where the commercial chemical product cannot be used in its intended manner. But just because an off-specification commercial chemical product that cannot be sold as a product is a hazardous secondary material does not mean that it is a solid waste. Commercial chemical products, including off-specification products, are not solid wastes when recycled (40 C.F.R. § 261.2(c)(3) and Table 1), although, as with all hazardous secondary material recycling, that recycling must meet the legitimacy test.⁸

⁸ Industry Petitioner also assert that EPA failed to respond to a comment on this topic. Industry Pet. Br. 63. The comment in question simply recognized that a commercial chemical product is only a secondary material if it is being used in a

Cont.

IV. ENVIRONMENTAL PETITIONERS' CHALLENGES TO THE VERIFIED RECYCLER EXCLUSION LACK MERIT.

Environmental Petitioners challenge the verified recycler exclusion from the opposite perspective, putting forward three arguments, none of which are any more persuasive than industry's.

A. The Verified Recycler Exclusion Was Properly Noticed.

As a threshold issue Environmental Petitioners argue that EPA failed to propose the verified recycler exclusion, and that the exclusion is not a logical outgrowth of what EPA did propose. Environmental Pet. Br. 30-31. It is true that EPA's 2011 proposal did not include the specific regulatory provisions that EPA ultimately adopted, but those provisions are a logical outgrowth of EPA's proposal.

Environmental Petitioners point to the second page of the preamble to EPA's 2011 proposal, where EPA stated that it was "proposing to replace the [2008 version of the] exclusion . . . with an alternative Subtitle C regulation for hazardous recyclable materials." *Id.* at 31 (citing 76 Fed. Reg. at 44,096/1). The quoted language is from the preamble's introductory summary. In the immediately preceding paragraph, EPA had cautioned that

[t]he intent of this summary is to give a brief overview of the proposed changes. More detailed discussions, including the Agency's rationale for the changes, are discussed in later sections.

manner different from its normal manner. API comment at 43 (JA0614). As explained above, no one disputes that.

76 Fed. Reg. at 44,096/1 (JA0206). In the actual discussion of EPA’s proposal, EPA explained its rationale for revising the 2008 Rule’s version of the transfer-based exclusion. EPA had assumed that the exclusion “would operate with the same level of oversight as the Subtitle C hazardous waste regulations,” but the 2008 exclusion “lack[ed] several important implementation provisions,” primarily the permit requirement, “which ensures that EPA or the state has reviewed a facility’s planned operations, . . . allows public participation in the environmental decision-making process, . . . [and] ensure[s] that both the regulatory authority and the regulated community have the specific information they need” in order to comply with the exclusion’s conditions. *Id.* at 44,109/1-2 (JA0219).

EPA proposed to address these shortcomings by withdrawing the exclusion and regulating transferred hazardous secondary materials as wastes. *Id.* at 44,110/1 (JA0220). But EPA also stated that it is “particularly interested in any information commenters can provide about alternative approaches that would address [these] concerns,”

e.g., by adding more conditions, such as requiring the reclamation facility be inspected every five years, or by requiring the reclamation facility certify annually that there have been no releases.

Id.

The verified recycler exclusion adds to the 2008 Rule’s transfer-based exclusion the very types of additional conditions on which EPA sought comment, as an alternative to an outright withdrawal of the exclusion. The verified recycler exclusion

has all of the same conditions as the 2008 Rule's exclusion, but replaces the 2008 Rule's "reasonable efforts" audit with a variance requirement, which requires recyclers to address everything the generator had to address in the audit. *Compare* 40 C.F.R. § 261.4(a)(24)(v)(B) (2014) *with* 40 C.F.R. § 261.4(a)(24)(v)(B) (2015) *and with id.* § 261.4(a)(24)(vi)(G) (2015). The verified recycler exclusion also adds emergency preparedness and response requirements, such as training and contingency plans, which are preventative measures that EPA identified as a regulatory gap in the 2008 Rule's version of the transfer-based exclusion. 76 Fed. Reg. at 44,107/3 (JA0217); 40 C.F.R. § 261.4(a)(24)(v)(E). These requirements are structured on the same emergency preparedness and response requirements that were the basis for the requirements EPA proposed in 2011. 76 Fed. Reg. at 44,112/2 (JA0222); 80 Fed. Reg. at 1710-11 (JA0281-0282).

These additional conditions are logical outgrowths of the proposal. As this Court has explained:

"[A]n agency may issue rules that do not exactly coincide with the proposed rule as long as the final rule is the 'logical outgrowth' of the proposed rule." *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991). "Under the 'logical outgrowth' test . . . , the key question is whether commenters 'should have anticipated' that EPA might" issue the final rule it did.

City of Portland, 507 F.3d at 715 (citations omitted). *See also CSX Transp. Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079-80 (D.C. Cir. 2009) ("A final rule qualifies as a logical outgrowth 'if interested parties "should have anticipated" that the change was

possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.’ [citations omitted].”).

Environmental Petitioners do not grapple with the actual language in EPA’s notice of proposed rulemaking, which put the public on notice that additional conditions were an option. Nor do they explain why they should not have anticipated that EPA would address the issues identified in the notice of proposed rulemaking by retaining the exclusion at 40 C.F.R. § 261.4(a)(24), with the additional conditions adopted in the 2015 Rule. Instead, Environmental Petitioners rest on the conclusory statement that the verified recycler exclusion is not a logical outgrowth because EPA only proposed to eliminate the exclusion in its entirety. Environmental Pet. Br. 31. That is insufficient, and retaining the verified recycler exclusion with revisions is a logical outgrowth of EPA’s 2011 proposal.

B. The Verified Recycler Exclusion Is Lawful.

Environmental Petitioners’ main challenge to the verified recycler exclusion is that a generator that pays to have its hazardous secondary materials transferred to a third-party is necessarily discarding those materials. Environmental Pet. Br. 31. Environmental Petitioners are simply repeating the same arguments considered and rejected in *Solvay*. And, regardless of the weight given to the *Solvay* decision, Environmental Petitioners’ argument is wrong.

1. *Solvay* resolves Environmental Petitioners' argument.

Environmental Petitioners do not acknowledge *Solvay*, much less attempt to distinguish it, despite the fact that three of the Environmental Petitioners were parties in that case. The environmental petitioners in *Solvay* made the same argument as Environmental Petitioners do here, that EPA excluded materials “that have been ‘discarded’ within the ordinary meaning of that term.” 608 Fed. Appx. at 12. The Court held that neither RCRA nor precedent prevents EPA from defining solid waste to exclude certain secondary materials. *Id.* In *Solvay*, as here, EPA had defined solid waste to exclude secondary materials legitimately recycled, whether the recycling occurs on-site by a generator or off-site by a third-party. The *Solvay* court explained that “discard” may be ambiguous in some situations but not others, that EPA’s characterization of which types of secondary materials are discarded is entitled to deference, that EPA engaged in “reasoned decisionmaking,” and that the exclusions “constitute a reasonable interpretation of ambiguous language.” *Id.* (citations omitted). Furthermore, under the *State Farm* standard, EPA “considered the relevant factors and articulated a rational connection between the facts found and the choice made.” *Id.* at 13 (citations omitted). There is no reason for a different result here.⁹

⁹ In the rule upheld in *Solvay*, payment for a secondary material did not determine whether or not the secondary material is a waste. *See* 76 Fed. Reg. at 15,496/1 (as long as tires removed from cars are handled as valuable commodities, payment by the recycler that burns them is not dispositive) (JA0203).

2. Environmental Petitioners are wrong on *Chevron* and the APA.

Even apart from *Solvay*, Environmental Petitioners' argument about the dispositive impact of a generator's payment to a transporter for off-site recycling lacks merit.

a. *Chevron* Step 1.

Environmental Petitioners' first point is that paying a third-party to transfer hazardous secondary material to be recycled into a product is necessarily discard because the term "discard" is unambiguous under *Chevron* Step 1. Environmental Pet. Br. 31-34. Environmental Petitioners start from the accurate proposition that "discard" has its "ordinary, plain English meaning" of disposed of, thrown away, or abandoned. *Id.* at 31, citing *AMC I*. Environmental Petitioners then repeatedly assert that when a company pays to have its hazardous secondary materials transferred, "it has discarded those materials in the ordinary sense of the word." *Id.* at 31, 32, 33. But Environmental Petitioners never explain *why*. They say, for example, that even if materials are properly contained, they are nonetheless discarded if it costs money to have the contained materials transferred to a third-party recycler to be made into a product. *Id.* at 32-33. But Environmental Petitioners do not analyze why a generator who pays a transporter, but also makes the effort to contain its hazardous secondary material, and to comply with all of the other legitimacy factors and all of the other conditions of the verified recycler exclusion in order to ensure that the hazardous

secondary material is legitimately recycled into a product, is *automatically* disposing of, throwing away, or abandoning those materials.

Similarly, although Environmental Petitioners concede that “discard” may be ambiguous as applied to some situations, citing *ABR*, they assert that payment “is not one of them.” Environmental Pet. Br. 33. This fails to address what the *ABR* Court acknowledged: no one factor is dispositive. *See, e.g.*, 80 Fed. Reg. at 1745/2 (JA0316) (*ABR* is “a warning to the Agency to examine all factors, not just one (*e.g.*, land placement), when deciding whether a material is a waste.”).

Environmental Petitioners assert that *Safe Food* is not relevant to their argument because they focus on the specific situation of payment to transfer secondary materials to a recycler, whereas *Safe Food* simply held that transferred materials in general are not automatically discarded. Environmental Pet. Br. 34. The Court in *Safe Food* held that RCRA does not compel the conclusion that transfer is necessarily discard, *i.e.*, that under *Chevron* Step 1, the term “discard” does not unambiguously include transfer. 350 F.3d at 1268. The Court went on to consider whether EPA’s interpretation is permissible (and upheld EPA on that ground, as well). *Id.* at 1269. Environmental Petitioners here provide no more reason why “discard” unambiguously includes all transfers of secondary materials where the generator pays the transporter, than the environmental petitioners in *Safe Food* could show why discard unambiguously includes all transfers of secondary materials. As we will

explain in the next section, EPA reasonably found that Environmental Petitioners' assumption that payment necessarily equates to discard is not necessarily true.

Environmental Petitioners also make an argument based on faulty logic. According to Environmental Petitioners, *ABR* held that if a regulation covers at least some non-wastes, it is invalid. Therefore, if a regulation excludes at least some wastes, it too must be invalid. Environmental Pet. Br. 34. This begs the question of whether all hazardous secondary materials which the generator pays to have transferred to a third-party for legitimate recycling unambiguously *are* wastes. Environmental Petitioners cannot simply assume the truth of their argument, and conclude that the regulation is therefore invalid.

Environmental Petitioners also mistakenly assert that under *ABR*, the dividing line between waste and non-waste cannot be compliance with the conditions of an exclusion. Environmental Pet. Br. 33. Thus, they argue, compliance with the conditions of the verified recycler exclusion cannot make a hazardous secondary material a non-waste when someone pays to transfer the material to a third party for legitimate recycling. Environmental Petitioners misread that case. In *ABR* the Court faulted the condition as overbroad, because EPA interpreted "continuous" to mean without any delay, even for storage. 208 F.3d at 1052. Here, in contrast, the conditions of the exclusion are reasonably related to discard, as we demonstrate in Argument IV.C, below.

b. *Chevron* Step 2 and the arbitrary and capricious standard.

EPA's interpretation of "discard" is permissible and must be upheld under *Chevron* Step 2, and is reasonable and must be upheld under section 706 of the APA. Environmental Petitioners' argument, that even if "discard" is ambiguous in the situation where a firm pays to have its hazardous secondary materials transferred for recycling, EPA's interpretation is nonetheless impermissible and unreasonable, is wrong. Environmental Pet. Br. 34-39.

EPA's interpretation is reasonable because the end result of transferring hazardous secondary materials under the verified recycler exclusion is the manufacture of a product that is indistinguishable from a product made from virgin materials. As noted in *Safe Food*, "[n]obody questions that virgin fertilizers and feedstocks are products rather than wastes. Once one accepts that premise, it seems eminently reasonable to treat materials that are indistinguishable in the relevant respects as products as well." 350 F.3d at 1269. By promulgating the additional conditions for the 2015 Rule's version of the transfer-based exclusion, and by codifying the definition of legitimate recycling, EPA has limited the exclusion to materials that are in fact legitimately recycled and not discarded.

According to Environmental Petitioners, EPA failed to consider whether payment equates to discard. Environmental Pet. Br. 35. However, EPA did consider the economics involved when hazardous secondary materials are transferred. In the

preamble to the 2008 Rule, EPA explained that the alternative to recycling “carries a cost that is based on the existing market for hazardous waste transportation, treatment, and disposal. Hence, unless there is a strong competition in recycling markets or the hazardous secondary materials are extremely valuable, a recycler may be able to charge generators simply because alternative disposal options cost more.” 73 Fed. Reg. at 64,707/1 (JA0104). Thus, “a recycler may be able to charge generators and still be a legitimate recycling operation.” *Id.* Although “negative economic factors would be an indication that further evaluation of the recycling operation may be warranted in assessing the legitimacy factors,” negative value alone is not dispositive. *Id.* at 64,706/2 (JA0103). Even though “the generator’s objective may be finding the least cost alternative for getting rid of the hazardous secondary material, the recycling may well be a legitimate recycling operation.” 72 Fed. Reg. 14,172, 14,201/1 (Mar. 25, 2007) (JA0047).

EPA also agreed with comments stating that all commodities, virgin or secondary, fluctuate in price, so a numerical test for evaluating all recycling transactions for economic sufficiency is not possible. “We also acknowledge that fluctuations in markets for hazardous secondary materials and recycled products, and subsequent impacts in revenue flows, create another challenging aspect of developing a test for the consideration of economics.” Revisions to the Definition of Solid Waste Final Rule, Response to Comments Document, Summaries and Responses (2008) at 406 (JA0524).

Environmental Petitioners also assert that EPA engaged in the “circular reasoning” that the agency cautioned against in 2011. Environmental Pet. Br. 35-36. Environmental Petitioners quote from a portion of EPA’s 2011 Regulatory Impact Analysis, where EPA noted that defining what is not discarded by adding conditions similar to those that would apply if a hazardous secondary material were discarded, could be circular and contrary to RCRA’s intent. This hypothetical concern – which is mentioned once in passing in EPA’s initial economic analysis and appears nowhere else in the rulemaking record – does not match the finding in *Safe Food* upholding EPA’s use of conditions to define discard. Environmental Petitioners’ point is also undermined by their next argument, that the verified recycler exclusion fails to include sufficient conditions to ensure that transferred materials are not discarded. *See, e.g.*, Environmental Pet. Br. 42 (the exclusion does not require compliance with numerous standards).

Before reaching that argument, however, Environmental Petitioners also assert that deference to EPA’s interpretation is improper because EPA did not articulate why materials that companies must pay to have transferred are not necessarily discarded. Environmental Pet. Br. 36-37. EPA did provide a sufficiently clear explanation that payment, like transfer in general, while relevant, is not determinative of a discard. 73 Fed. Reg. at 64,706/2, 64,707/1 (JA0103, 0104); *see also* 72 Fed. Reg. at 14,201/1 (JA0047). This also answers Environmental Petitioners’ related argument, that under *Safe Food* the market value of the secondary materials is an important

indicator of whether they are wastes. *Id.* at 38. Environmental Petitioners fail to demonstrate why one aspect of a transfer – a payment to the transporter – must be dispositive of the nature of the transaction. The term “discard” is ambiguous in the context of hazardous secondary materials transferred to a third-party for off-site recycling, and EPA reasonably determined that while such transfers are more likely to involve discard, the term does not foreclose situations where someone paying to have their secondary materials transferred for legitimate recycling is not discarding it.

C. The Verified Recycler Exclusion Reasonably Defines When Hazardous Secondary Materials Transferred To Third-Parties Are Not Discarded.

Environmental Petitioners’ final argument against the verified recycler exclusion is that it will not prevent discard. Environmental Pet. Br. 39-43; *see also id.* at 38-39. EPA addressed how each of the exclusion’s conditions prevent discard. 80 Fed. Reg. at 1710-14 (JA0281-0285). According to Environmental Petitioners, however, the exclusion allows for too much time to accumulate hazardous secondary materials. Environmental Pet. Br. 40-42.

While over-accumulation of a material is a factor that can lead to discard (due to mismanagement or abandonment), accumulation prior to recycling is not itself discard *per se* (unless it is done speculatively, the prohibition of which is a condition of the exclusion, *see* 40 C.F.R. § 261.1(c)(8)). The verified recycler exclusion addresses the potential for discard directly, through management standards, including the codified contained standard and the management standards imposed via the permit or

the variance at the recycling facility. The exclusion's preventative measures (including the emergency preparedness and response and financial assurance condition) also address the potential for discard. Although third-party recyclers still have an economic incentive to accumulate hazardous secondary materials, EPA reasonably concluded that the conditions in the verified recycler exclusion would address the regulatory gaps identified in the 2011 proposal, thereby protecting against discard and the resulting damage, while allowing the legitimate recycling that has been occurring under the 2008 Rule to continue. 80 Fed. Reg. at 1708-09 (JA0279-0280); *see also id.* at 1706/3, 1711/1 (JA0277, 0282).

Environmental Petitioners also argue that the verified recycler exclusion's general containment requirement does not prevent volatile air emissions. Environmental Pet. Br. 42-43. The variance process does address air emissions (as well as other types of releases) from recycling operations. 80 Fed. Reg. at 1714/3 (JA0285) (the sixth criterion is intended "to specifically address the differences in the preventative measures between a RCRA-permitted facility as compared to a facility managing excluded hazardous secondary material, including the lack of prescriptive standards for storage and containment (including air emissions standards)").

In sum, the verified recycler exclusion was properly noticed, reasonably recognizes that paying for a third-party to transfer a company's secondary materials off-site for legitimate recycling does not necessarily indicate the materials were

discarded, and is reasonably designed to prevent transferred materials from being discarded.

V. ENVIRONMENTAL PETITIONERS' CHALLENGES TO THE PRE-2008 EXCLUSIONS LACK MERIT.

Over the course of decades, EPA has promulgated, through proper notice and comment rulemaking, 32 distinct recycling exemptions and exclusions, each with its own particular conditions, requirements, and factual records. The substance of these exclusions is not at issue in the present rulemaking, and the statute of limitations for challenging these exclusions has long since passed. *See* 42 U.S.C. § 6976(a)(1). Yet, Environmental Petitioners attempt to use this rulemaking to reopen and challenge these lawful exclusions *en masse*. Because EPA expressly refused to reopen the pre-2008 exclusions, and reasonably deferred action on codifying specific requirements for containment and notification, Environmental Petitioners' challenges should be rejected.

A. EPA Did Not Reopen Comment On The Substantive Provisions Of The Pre-2008 Exclusions.

EPA expressly stated in the 2011 proposal that it was “not reopening comment on any substantive provisions of the [pre-2008] regulatory exclusions or exemptions.” 76 Fed. Reg. at 44,138/3 (JA0248). Instead, EPA solicited comment only on certain narrow provisions designed to enhance the enforceability of the existing exclusions by either clarifying existing obligations (legitimacy and containment) or enabling additional compliance monitoring (notification). In spite of EPA's clear statement

that it was not reopening the pre-2008 exclusions, Environmental Petitioners claim EPA did just that. Environmental Pet. Br. 43-44. Environmental Petitioners are mistaken. *See Safe Food*, 350 F.3d at 1267 (if EPA requests comment on specific alternatives to a regulation all facets do not become fair game for new challenges).

The only support Environmental Petitioners marshal for their argument is dicta in a footnote from *Mendoza v. Perez*, 754 F.3d at 1019 n.12. Environmental Petitioners point to the statement that the reopener doctrine applies when an agency “has considered substantively changing a rule but ultimately decline[s] to do so.” Environmental Pet. Br. 43-44 (quoting *Mendoza*, 754 F.3d at 1019 n.12).

Notably, the sentence *prior* to the one quoted by Environmental Petitioners states that “the reopener doctrine permits a plaintiff to bring an otherwise-stale challenge where the agency ‘has undertaken a serious, substantive reconsideration of the existing rule.’” *Id.* (quoting *P & V Enters. v. U.S. Army Corps of Eng’rs*, 516 F.3d 1021, 1023-24 (D.C. Cir. 2008)). Environmental Petitioners make no suggestion that EPA conducted any such “serious, substantive reconsideration” of each of the 32 pre-2008 exclusions, nor did EPA do so. Instead, EPA simply considered adding to the pre-2008 exclusions the same conditions that EPA was considering adding to the generator-based exclusion at 40 C.F.R. § 261.4(a)(23). Doing so would codify requirements already implicit in the pre-2008 exclusions, in the case of legitimacy and containment, and would serve “as means to better enforce the [existing] regulations.” 76 Fed. Reg. at 44,138/3 (JA0248).

Having evaluated the minimum requirements to define discard for hazardous secondary material reclaimed under the control of the generator, EPA considered it “prudent” to review the pre-2008 exclusions as well. *Id.* at 44,139/1 (JA0249). EPA by no means conducted the type of detailed review of each pre-2008 exclusion necessary to reopen those provisions. To the contrary, EPA expressly refused to consider modifying the substance of the underlying exclusions. Accordingly, EPA did not reopen the pre-2008 exclusions. *See, e.g., Am. Iron & Steel Inst. v. EPA*, 886 F.2d 390, 398 (D.C. Cir. 1989) (no reopener occurred where EPA did not consider whether permits by rule or post-closure permits should be treated as RCRA permits, but instead only “asked for comments on the specific conditions that it proposed attaching to RCRA permits by rule.”).

B. Deferring A Decision On Adding Conditions To The Pre-2008 Exclusions Is Not Final Agency Action.

Although substantive revisions to the pre-2008 exclusions were expressly outside of the scope of this rulemaking, Environmental Petitioners nonetheless claim that EPA took final action by not revising those exclusions. Environmental Pet. Br. 44-45. Environmental Petitioners are again mistaken. First, because EPA did not reopen the substance of the pre-2008 exclusions, the issues raised by Environmental Petitioners are outside the scope of the rulemaking, and EPA’s inaction in modifying these exclusions cannot constitute final agency action.

Second, the action that Environmental Petitioners point to as the “consummation” of EPA’s decision-making process on this issue, Environmental Pet. Br. 44, was not a final action, but instead a deferral of action. EPA explained “we are not finalizing specific conditions for the pre-2008 recycling provisions in today’s rule and are instead deferring action until EPA can more adequately address commenters’ concerns, including comments on the record.” 80 Fed. Reg. at 1741/2 (JA0312). It is well established that “[a] decision by an agency to defer taking action is not a final action reviewable by the court.” *API II*, 216 F.3d at 68.

C. EPA Reasonably Deferred Action On Codifying Specific Conditions For The Pre-2008 Exclusions.

Environmental Petitioners claim that the pre-2008 exclusions are unlawful because EPA deferred a decision whether to codify new overarching conditions for containment and notification. They advance two arguments in support of this claim. First, they argue that EPA failed to explain why it did not promulgate the containment and notification conditions proposed in 2011. Environmental Pet. Br. 45-47. Second, they argue that EPA’s deferral was arbitrary. *Id.* 48-52.

Environmental Petitioners are wrong on both counts. In the otherwise final 2015 Rule, EPA explains that (1) the record is not sufficient to support application of the proposed containment and notification conditions uniformly across the 32 different pre-2008 exclusions, and (2) additional information is necessary to determine whether additional conditions are needed for the pre-2008 exclusions.

1. EPA sufficiently explained its deferral of action on the containment and notification conditions.

In the 2008 Rule, EPA established conditions to help define discard for hazardous secondary materials regulated under the exclusions promulgated in that Rule, for on-site recycling under the generator's control and for off-site recycling under a third-party's control. *See* 76 Fed. Reg. at 44,138/2 (JA0248). In the 2011 proposal, EPA requested comment on whether certain of these conditions should be codified for the pre-2008 recycling exclusions. EPA wrote: "[i]n developing today's proposal, we are interested in whether these conditions should be codified for the pre-2008 recycling exclusions and exemptions." *Id.*

Environmental Petitioners – seizing on out-of-context language describing the proposed conditions for the generator-controlled exclusion – argue that the proposed containment and notification conditions constitute rigid “minimum requirements,” without which each and every pre-2008 exclusion has suddenly become unlawful. Environmental Pet. Br. 45-47. Environmental Petitioners characterize the 2011 proposed rule as “conclu[ding]” that the containment and notification conditions are “minimum” and “necessary” requirements, and then argue that EPA failed to sufficiently “refute” this alleged conclusion in the final rule. *Id.* Environmental Petitioners are mistaken, because EPA reached no such “conclusion” in the proposed rule, and because EPA explained why it proposed the containment and notification conditions, and why it ultimately deferred action.

a. EPA did not make any conclusions in the proposed rule.

In its proposal, EPA did not conclude that the containment and notification conditions were minimum requirements necessary to maintain the legality of the exclusions. EPA simply sought comment on codifying these conditions in order to enhance enforcement of the regulations. In its proposed rule, EPA explained that it was “not reopening comment on any substantive provisions of the regulatory exclusions or exemptions” and that “[t]he inclusion of requirements for legitimacy, containment and notification are strictly meant as means to better enforce the regulations.” 76 Fed. Reg. at 44,138/3 (JA0248). EPA also explained “the containment condition – as with the legitimacy criteria – is implicit in all of the regulations to which it would apply.” *Id.* Accordingly, EPA proposed codification of these conditions as possible mechanisms to improve enforcement, *not* as requirements EPA had determined to be legally necessary.

Environmental Petitioners seize on a single out-of-context sentence in the proposed rule to argue that EPA somehow made a final determination in the 2011 proposal. In the paragraph following the above-quoted explanation that EPA was exploring ways to enhance enforcement and not reopening the substance of the exclusions, EPA wrote that “[f]our conditions required for the [proposed] generator-controlled exclusions in 40 C.F.R. § 261.4(a)(23) – legitimate recycling, no speculative accumulation, containment, and notification – constitute what we believe to be the

minimum requirements necessary to define when recycled hazardous secondary materials are not discarded.” 76 Fed. Reg. at 44,138-39 (JA0248-0249).

Environmental Petitioners contend that this sentence is a “conclusion” that the pre-2008 exclusions require the same conditions as EPA proposed for the generator exclusion. Environmental Pet. Br. 46. However, this sentence simply describes EPA’s proposal for the generator exclusion. In the following sentence, EPA wrote that “[t]herefore, it *seems prudent* to review past exclusions and exemptions to ensure these regulatory provisions clearly require these newly codified standards.” 76 Fed. Reg. at 44,139/1 (emphasis added) (JA0249).

Had EPA reached any sort of conclusion that the proposed requirements were necessary, it would not then write that it “seems prudent” to review the pre-2008 exclusions. This language, along with EPA’s prior clarification that it was seeking to enhance enforcement and not opening the substance of the exclusions, is not consistent with Environmental Petitioners’ characterization of EPA’s proposal. The proposed rule did not draw any conclusions about the legal necessity of these conditions for the pre-2008 exclusions. It instead simply requested comment on whether codifying these conditions would help to enhance enforcement.

Regardless of Environmental Petitioners’ characterization of EPA’s language, the preamble to a proposed rule is just that – a proposal. *See United Steelworkers v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980) (“[A] final rule may properly differ from a proposed rule and indeed must so differ when the record evidence warrants

the change.”). After receiving comments on its proposal, EPA deferred the addition of these proposed conditions in the 2015 Rule, and, as described below, sufficiently explained its reasons for doing so. Environmental Petitioners’ attempt to shoehorn out of context “minimum requirements” language from the 2011 proposal into a “conclusion” that leaves EPA no choice regarding the final rule must fail.

b. EPA sufficiently explained its deferral of action on the containment and notification conditions.

In the 2011 proposal, EPA explained its bases for requesting comment on codifying containment and notification conditions for the pre-2008 exclusions. *See* 76 Fed. Reg. at 44,140 (JA0250). For the containment condition, EPA explained that “[h]azardous secondary materials that are released to the environment are not destined for recycling and are clearly discarded [and that] requiring that hazardous secondary materials be contained ensures that the materials are managed in a manner protective of human health and the environment.” *Id.* at 44,140/1. Because protection of human health and the environment motivated EPA’s proposal, EPA undertook an exploration of the connection between the exclusions and instances of environmental harm.¹⁰ EPA explained that because the Correlation Study suggested that mismanagement of hazardous secondary materials was one of the causes of 11

¹⁰ *See* “Correlation of Recycling Damage Cases with Regulatory Exclusions, Exemptions, or Alternative Standards” (“Correlation Study”) (JA0561).

percent of the damage cases, EPA proposed adding the containment standard to help address these damage cases. *Id.*

For the notification condition, EPA explained that its proposed inclusion was “strictly meant as a means to better enforce the regulations.” 76 Fed. Reg. at 44,138/3 (JA0248). The condition was intended to enhance enforcement in part through improved compliance monitoring. *Id.* at 44,140/1 (JA0250). However, EPA cautioned that notification that might lead to unnecessary monitoring could waste agency time and resources. *Id.* at 44,140/2-3. EPA noted that “inefficient use of resources would lower the overall effectiveness of regulators’ ability to monitor compliance and could potentially increase the risk of environmental damage from abuse.” *Id.* at 44,140/3. Accordingly, EPA proposed to codify the notification requirement for the pre-2008 exclusions to improve compliance monitoring in a manner that efficiently utilized limited monitoring resources, and thereby decrease the risk of environmental damage.

In the 2015 Rule, EPA again explained that its request for comment on the containment and notification conditions stemmed from EPA’s analysis of the Problems Study and the Correlation Study. 80 Fed. Reg. at 1764/2 (JA0335). However, EPA concluded that the Correlation Study was flawed to the point that it was insufficient to justify the proposed codification of the containment and notification conditions. *See* 80 Fed. Reg. at 1741/1-2, 1766/3 – 1767/2 (JA0312, 0337-0338); RTC at 247 (JA1138). Specifically, the Correlation Study did not verify

whether the specific damage incidents occurred at facilities that had claimed an exclusion, and if so, if that exclusion was the underlying cause of the damage. 80 Fed. Reg. at 1766/3 – 1767/1 (JA0337-0338); RTC at 247 (JA1138). Further, even the general correlation analysis only yielded a match in seven of the thirty-two recycling exclusions. 80 Fed. Reg. at 1741/1, 1767/2 (JA0312, 0338). EPA also found that due to a lack of data, it was difficult to analyze current trends in the damage cases, and thus even more difficult to accurately project future outcomes under different scenarios. 80 Fed. Reg. at 1741/1 (JA0312).

As a result of these shortcomings in the analysis, EPA concluded that the record is insufficient to support the uniform codification of the proposed containment and notification conditions across all 32 exclusions, and that “more information is needed prior to taking final action on specific conditions of the pre-2008 recycling provisions.” *Id.* at 1741/2. EPA explained that it was “deferring action until EPA can more adequately address commenters’ concerns.” *Id.*¹¹

Consistent with its stated enforcement-enhancement and environmental-protection motivations for proposing the conditions in the first place, EPA stated that it “may need to consider each exclusion in terms of evaluating specific regulatory gaps and

¹¹ EPA’s conclusion that it requires additional information is not strictly limited to information about “whether and how individual exclusions cause environmental damage,” as suggested by Environmental Petitioners. Environmental Pet. Br. 46. Instead, EPA stated generally that “more study is needed.” 80 Fed. Reg. at 1765/2 (JA0336).

whether additional conditions are needed to ensure protection of human health and the environment.” *Id.*

In addition, with respect to notification, the 2015 Rule reaffirmed that EPA’s intent was to enhance compliance monitoring. 80 Fed. Reg. at 1766/2 (JA0337).

However, commenters raised concerns regarding the burden of the proposed rule on states, which must review and process the forms. *Id.* at 1766/2-3. EPA noted that a lack of data “hinders EPA’s ability to more precisely estimate the burden on states and whether such a requirement would be environmentally beneficial.” *Id.* at 1766/3.

Moreover, it was not clear that additional regulatory action as opposed to other measures like outreach or compliance assistance would be necessary. *Id.* at 1767/1

(JA0338). Thus, consistent with EPA’s stated motivation in proposing the

notification condition – efficient use of monitoring resources to address

environmental damage – EPA found that the record did not support a conclusion that the requirement would enhance compliance monitoring. *Id.* at 1766/3 (JA0337).

Environmental Petitioners also argue that because the Correlation Study found a correlation between seven of the 32 pre-2008 exclusions and environmental damage cases, EPA must codify all of the proposed conditions for those seven exclusions for which a correlation was found. Environmental Pet. Br. 47. First, as described above, a notification regime that deploys limited resources inefficiently may burden the monitoring entities and not be environmentally beneficial. Second, EPA explained that it has already promulgated certain management standards for some exclusions

based on case-specific characteristics of the hazardous secondary material or recycling process, such as the use of drip pads to manage wastewaters and/or spent wood preserving solutions under 40 C.F.R. § 261.4(a)(9). 80 Fed. Reg. at 1766/1 (JA0337). Thus, “simply applying the contained standard wholesale across the 32 recycling provisions, may not be the most efficient or effective course of action as EPA would not be considering how the contained standard would work within each specific exclusion and its existing conditions.” *Id.* at 1766/2. Third, because EPA requested comment on codifying a specific notification condition across all 32 exclusions, EPA did not request comment on, and did not have a record to support, the piecemeal application of the conditions to some exclusions but not others.

Contrary to Environmental Petitioners’ contention, the 2015 Rule reasonably explains why EPA deferred a decision to codify the conditions that it initially proposed. EPA considered codifying the containment and notification conditions based on concerns about environmental harm and effective monitoring. However, EPA concluded that the record did not establish a sufficient connection between the pre-2008 exclusions and environmental harm and effective monitoring. EPA reasonably found that the record in the present rulemaking was not sufficient to justify codifying the proposed conditions and that further study is needed for EPA to determine whether additional conditions are necessary for the pre-2008 exclusions.

2. EPA reasonably deferred action on the notification condition.

Environmental Petitioners incorrectly argue that EPA's deferral of action on the notification condition was unlawful and arbitrary.¹² Environmental Pet. Br. 48-50. Environmental Petitioners' argument juxtaposes cherry-picked language from the 2011 proposal and the 2015 Rule, generating a false tension between the two documents. *See id.* at 48. Specifically, Environmental Petitioners argue that EPA's analysis of the burden on regulated companies in the 2015 Rule does not address EPA's stated motivation for proposing to codify the notification requirement. *Id.* However, Environmental Petitioners have simply ignored EPA's explanations.

EPA stated in the 2011 proposal and in the 2015 Rule that the notification condition was proposed in part to provide information to regulatory authorities "in order to enable adequate compliance monitoring." 76 Fed. Reg. at 44,140/1; 80 Fed. Reg. at 1766/2 (JA0250, 0337). As discussed above, EPA expressed concern in this context that "inefficient use of resources would lower the overall effectiveness of regulators' ability to monitor compliance and could potentially increase the risk of environmental damage from abuse." 76 Fed. Reg. at 44,140/3 (JA0250). To address this concern, EPA proposed codifying the notification condition to enhance

¹² Environmental Petitioners characterize EPA's action as a "refusal" to establish notification and containment conditions. Environmental Pet. Br. 48, 50. As explained above, and in the 2015 Rule, EPA has deferred action on these questions, not "refus[ed]" to codify containment and notification conditions.

compliance in a manner that avoided the inefficient use of resources and decreased the risk of environmental damage. In the 2015 Rule, EPA explained that it was not clear that the proposed condition would advance these goals.

First, EPA explained that it deferred action on notification in part because the record did not support a sufficient connection between specific pre-2008 exclusions and environmental damage.¹³ *See supra* Argument V.C.1. EPA also deferred action because of concerns about the burden on States. 80 Fed. Reg. at 1766/2-3 (JA0337). EPA explained that a lack of data “hinder[ed] EPA’s ability to more precisely estimate the burden on states and whether such a requirement would be environmentally beneficial.” *Id.* at 1766/3. EPA’s concern about overburdening states reasonably led EPA to conclude that, as opposed to enhancing compliance monitoring, the notification requirement as-proposed could instead lead to inefficient use of limited monitoring and enforcement resources, thereby undermining environmental benefits.

Environmental Petitioners also argue that because EPA deferred action in part due to a lack of sufficient information, EPA should have codified notification requirements so that it could gather additional information. Environmental Pet. Br. 49-50. This argument presupposes that the proposed notification condition is the only way to gather the information EPA needs. Instead of proceeding with the

¹³ Environmental Petitioners’ narrow focus on the burden on the regulated community in this subsection is puzzling, given that they acknowledge that EPA also deferred action on the containment and notification standards due to insufficient evidence regarding environmental damage. *See* Environmental Pet. Br. 46.

potentially burdensome and inefficient notification requirements that EPA initially proposed, EPA reasonably concluded that alternate means of information-gathering would be more suitable. *See* 80 Fed. Reg. at 1767/3 (“EPA agrees that a more inclusive approach to a potential rulemaking that involves stakeholders in upfront discussions would likely result in gainful information, more effective strategies for addressing issues, and better communication with the regulated community.”) (JA0338).

3. EPA reasonably deferred action on the containment condition.

Environmental Petitioners are similarly mistaken in their claim that EPA’s deferral of action on the containment condition was unlawful and arbitrary. Environmental Pet. Br. 50-52. Environmental Petitioners argue that EPA inconsistently relied on the existence of pre-existing management requirements as part of its reason for deferring action on containment even though EPA recognized in the 2011 proposal that these requirements existed.

There is no inconsistency here. EPA proposed codification of a containment condition for all pre-2008 exclusions, and noted that facilities operating under provisions that already contain management requirements would have to continue meeting those requirements. 76 Fed. Reg. at 44,139/1 – 44,140/1 (JA0249-0250). In response to comments, EPA concluded that in light of these exclusion-specific management practices and other facts specific to particular exclusions, “simply

applying the contained standard wholesale across the 32 recycling provisions, may not be the most efficient or effective course of action as EPA would not be considering how the contained standard would work within each specific exclusion and its existing conditions.” 80 Fed. Reg. at 1766/2 (JA0337). EPA’s *recognition* of the existence of pre-existing management practices at the time of the proposal is not in tension with EPA’s conclusion that the interaction between these management practices and the proposed overarching condition could have undesirable results.¹⁴

¹⁴ Environmental Petitioners also restate their “minimum requirement” argument, Environmental Pet. Br. 52, which we refuted in Argument V.C.1, above.

CONCLUSION

The petitions for review should be denied.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)**

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains **24,672 words**, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/ Daniel R. Dertke

DANIEL R. DERTKE

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ Daniel R. Dertke

DANIEL R. DERTKE

ORAL ARGUMENT NOT YET SCHEDULED

No. 09-1038**(and consolidated cases Nos. 15-1083, 15-1085, 15-1088, 15-1089, and 15-1094)**

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

AMERICAN PETROLEUM INSTITUTE,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

**On Petition for Review of Final Regulations
Promulgated by the United States Environmental Protection Agency**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with D.C. Circuit Rule (“Circuit Rule”) 28(a)(1), Industry Intervenor-Respondents (“Industry Intervenors”) certify as follows:

I. PARTIES AND *AMICI*

These consolidated cases involve six separate petitions for review of final actions of the United States Environmental Protection Agency. Accordingly, the requirement of Circuit Rule 28(a)(1)(A) to list the parties, intervenors, and *amici* that appeared in the U.S. District Court below does not apply. All parties, intervenors, and *amici* appearing in this case before this Court are listed in the Brief of Industry Petitioners,¹ except Solvay USA Inc. and Eastman Chemical Company, which appeared as *amici curiae* for Industry Petitioners.

II. RULINGS UNDER REVIEW

References to the rulings at issue appear in the Brief of Industry Petitioners.

III. RELATED CASES

To the knowledge of undersigned counsel, there are no related cases pending in this Court or any other court.

¹ Industry Petitioners are American Chemistry Council, American Gas Association, American Petroleum Institute, Edison Electric Institute, Freeport-McMoRan Inc., National Association of Manufacturers, National Rural Electric Cooperative Association, and Utility Solid Waste Activities Group.

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CORPORATE DISCLOSURE STATEMENTS

Industry Intervenors submit the following statements pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1:

American Chemistry Council (“ACC”) represents the leading companies engaged in the business of chemistry, including by participating on behalf of its members in administrative proceedings before the United States Environmental Protection Agency (“EPA”) and in litigation arising from those proceedings that affects member company interests. The business of chemistry is an \$801 billion enterprise and a key element of the nation’s economy. ACC has no parent company, and no publicly-held company has a 10 percent or greater ownership interest in ACC.

American Gas Association (“AGA”) is the national association of natural gas utilities with no parent company, subsidiaries or affiliates. AGA does not have any outstanding shares or debt securities in the hands of the public and no publicly-owned company has a 10 percent or greater ownership interest in AGA.

American Coke and Coal Chemicals Institute (“ACCCI”), which was founded in 1944, is the international trade association that represents 100 percent of the U.S. producers of metallurgical coke used for iron and steelmaking, and 100 percent of the nation’s producers of coal chemicals, who combined have operations in 12 states. It also represents chemical processors, metallurgical coal producers,

coal and coke sales agents, and suppliers of equipment, goods, and services to the industry. ACCCI has no parent corporation and no publicly-held company has a 10 percent or greater ownership interest in it. ACCCI is a “trade association” within the meaning of Circuit Rule 26.1.

American Petroleum Institute (“API”) represents over 625 member companies in all aspects of the oil and gas industry, including science and research, exploration and production of oil and natural gas, transportation, refining of crude oil and marketing of oil and gas products. API’s members are leaders of a technology-driven industry that supplies most of America’s energy, supports more than 9.8 million jobs and 8 percent of the U.S. economy, and, since 2000, has invested nearly 2 trillion dollars in U.S. capital projects to advance all forms of energy, including alternatives. API is a continuing association operated for the purpose of promoting the general commercial, regulatory, legislative, or other interests of the membership. API is a “trade association” within the meaning of Circuit Rule 26.1(b). API has no parent companies. No publicly-held company has a 10 percent or greater ownership interest in API.

Edison Electric Institute (“EEI”) is the national association of investor-owned electric utility companies with no parent company, subsidiaries or affiliates. EEI does not have any outstanding shares or debt securities in the hands of the

public and no publicly-owned company has a 10 percent or greater ownership interest in EEL.

Freeport-McMoRan Inc. (“Freeport”) is a publicly traded corporation organized under the laws of the State of Delaware and headquartered in Phoenix, Arizona, whose securities are listed on the New York Stock Exchange (NYSE: FCX). Freeport is a natural resource company with a global portfolio of mineral assets and oil and natural gas resources. Freeport has no parent companies, and no publicly-held corporation has a 10 percent or greater ownership interest in it.

Metals Industries Recycling Coalition (“MIRC”) is an informal organization comprised of several metals companies and trade associations representing the interests of iron, steel, nickel, chromium, copper, and brass industries. MIRC was formed, in part, to fund and conduct activities associated with EPA’s definition of solid waste rulemaking. As such, it has no parent company, subsidiaries or affiliates. It is unincorporated and therefore has no publicly traded stock, and thus no publicly-held corporation owns 10 percent or more of stock in it. While it may not be required under Circuit Rule 26.1(b), MIRC also provides the following information about its current members:

- The Copper and Brass Fabricator’s Council is a trade association that represents the principal copper and brass mills in the United States. The 20 member companies together account for the fabrication of more than 80 percent of

all copper and brass mill products produced in the United States, including sheet, strip, plate, foil, bar, rod, and both plumbing and commercial tube. These products are used in a wide variety of applications, chiefly in the automotive, construction, and electrical/electronic industries.

- The Copper Development Association Inc. (“CDA”) is the market development and engineering services arm of the copper industry, chartered to enhance and expand markets for copper and its alloys in North America. Its 70 member companies comprise the principal copper producers and fabricators of copper and copper alloy mill products in the United States, serving the nation’s building construction, wire and cable, transportation, industrial and consumer products markets. CDA is affiliated with the International Copper Association, Ltd., which helps fund and coordinate market development efforts through 28 centers worldwide.

- The International Metals Reclamation Company, LLC (“Inmetco”) is a wholly-owned subsidiary of Horsehead Holding Corp., a publicly-held corporation. Inmetco operates a high temperature metals recovery facility in Ellwood City, Pennsylvania, where it recovers nickel, chromium, and iron (along with smaller amounts of other metals) from a variety of metal-bearing secondary materials, as well as cadmium and nickel from used batteries.

- Specialty Steel Industry of North America (“SSINA”) is a national trade association comprised of 17 producers of specialty steel products, including stainless, electric, tool, magnetic, and other alloy steels. SSINA members produce steel by melting scrap metal in electric arc furnaces (“EAF”), which, as the name implies, use electricity, most of which is manufactured and supplied by coal-fired utilities, as their primary energy source to melt steel. SSINA members account for over 90 percent of the specialty steel manufactured in the United States.

- Steel Manufacturers Association (“SMA”) is the primary trade association of EAF carbon steel producers, often referred to as steel “minimills.” SMA’s 35 member companies recycle scrap metal in EAFs to produce various steel products, including carbon and alloy steels, and account for over 50 percent of U.S. steel production.

- American Iron and Steel Institute (“AISI”) represents 19 North American steel mills, including integrated, electric arc furnace, and reconstituted mills. AISI’s mission is to promote steel as the material of choice and to enhance the global competitiveness of the North American steel industry. AISI’s members account for two-thirds of U.S. raw steel production. Other than Inmetco, as described above, none of the forgoing trade associations or business organizations has a parent corporation or other publicly-held company that has a 10 percent or greater ownership interest in it. The Copper and Brass Fabricator’s Council, SMA,

SSINA, and AISI are “trade associations” within the meaning of Circuit Rule 26.1(b).

The National Association of Manufacturers (“NAM”) is the nation’s largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM’s mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America’s economic future and living standards. The NAM has no parent company, and no publicly-held company has a 10 percent or greater ownership interest in the NAM.

National Mining Association (“NMA”) is a “trade association” within the meaning of Circuit Rule 26.1(b) which represents the interests of the mining industry before Congress, the administration, federal agencies, the courts, and the media. NMA is not a publicly-held corporation and has no parent company. No publicly-held corporation has a 10 percent or greater ownership interest in NMA.

National Rural Electric Cooperative Association (“NRECA”) is the nonprofit national trade association for electric cooperatives. On behalf of its members, NRECA participates in administrative and judicial proceedings involving or affecting its members’ interests. NRECA has no parent company. No

publicly-held company has a 10 percent or greater ownership interest in NRECA. NRECA is an unincorporated entity.

Society of Chemical Manufacturers and Affiliates (“SOCMA”), a “trade association” within the meaning of Circuit Rule 26.1(b), is the only U.S.-based trade association dedicated solely to the specialty chemical industry. Since 1921, SOCMA has represented a diverse membership of small, medium and large chemical companies located around the world. Its members play an indispensable role in the global chemical supply chain by producing intermediates, specialty chemicals and ingredients used to develop a wide range of industrial, commercial and consumer products essential to the well-being and lives of people everywhere. The various exclusions from the regulatory definition of “solid waste” at issue in this litigation are very important to the business practices of SOCMA member companies. More than 70 percent of SOCMA’s U.S.-based manufacturing members are small businesses. SOCMA is not a publicly-held corporation and has no parent company. No publicly-held corporation has a 10 percent or greater ownership interest in SOCMA.

Utility Solid Waste Activities Group (“USWAG”) is an association of approximately one hundred and ten individual electric utilities as well as EEI, NRECA, and AGA, representing the electric and gas utility industry on rulemaking and administrative proceedings before EPA under the Resource Conservation and

Recovery Act, 42 U.S.C. §§ 6901 *et seq.*, and in litigation arising from such proceedings that affect its members. USWAG members are affected by the final action of the EPA that is challenged in this proceeding. USWAG has no parent company. USWAG does not have any outstanding shares or debt securities in the hands of the public and no publicly-owned company has a 10 percent or greater ownership interest in USWAG.

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GLOSSARY OF TERMS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

2008 Rule	Revisions to the Definition of Solid Waste, 73 Fed. Reg. 64,668 (Oct. 30, 2008)
2011 Proposal	Definition of Solid Waste, 76 Fed. Reg. 44,094 (proposed July 22, 2011)
2015 Rule	Definition of Solid Waste, 80 Fed. Reg. 1694 (Jan. 13, 2015)
Correlation Study	EPA, <i>Correlation of Recycling Damage Cases with Regulatory Exclusions, Exemptions or Alternative Standards</i> (2011), EPA-HQ-RCRA-2010-0742-0010
Environmental Problems Study	EPA, <i>An Assessment of Environmental Problems Associated with Recycling of Hazardous Secondary Materials</i> (2007), EPA-HQ-RCRA-2002-0031-0355.2
EPA	United States Environmental Protection Agency
JA	Joint Appendix
Market Forces Study	2006 <i>Study of Potential Effects of Market Forces on the Management of Hazardous Secondary Materials Intended for Recycling</i>
RCRA	Resource Conservation and Recovery Act

**Response to
Comments**

*EPA, Revisions to the Definition of Solid
Waste Final Rule Response To Comments
Document Summaries and Responses.*
(2014) EPA-HQ-RCRA-2010-0742-0372

**Transfer Based
Exclusion**

40 C.F.R. § 261.4(a)(24)-(25) (July 1, 2015)

**Verified Recycler
Exclusion**

Definition of Solid Waste, 80 Fed. Reg.
1694, 1775-77 (Jan. 13, 2015) (to be
codified at 40 C.F.R. § 261.4(a)(24)-(25))

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the briefs and addenda of the Industry Petitioners, Environmental Petitioners, and Respondent U.S. Environmental Protection Agency (“EPA” or “the agency”).

SUMMARY OF ARGUMENT

Environmental Petitioners’ challenge² to EPA’s “Definition of Solid Waste,” 80 Fed. Reg. 1694 (Jan. 13, 2015) (“2015 Rule”) is flawed on jurisdictional and substantive grounds.

This Court has defined and limited jurisdiction to review EPA actions under the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6901 *et seq.* The Court can review only three types of agency actions: “the promulgation of final regulations, the promulgation of requirements, and the denial of petitions for the promulgation, amendment or repeal of RCRA regulations.” *Am. Portland Cement All. v. EPA*, 101 F.3d 772, 775 (D.C. Cir. 1996) (citing RCRA § 7006(a)(1), 42 U.S.C. § 6976(a)(1)).

With respect to 32 exclusions from the regulatory definition of solid waste for recycled materials that existed as of 2008 (the “Pre-2008 Exclusions”), EPA has taken none of these actions. Rather, EPA has deferred action on the proposed

² The Environmental Petitioners are California Communities Against Toxics, Clean Air Council, Coalition For A Safe Environment, Louisiana Environmental Action Network, and Sierra Club.

addition of notification and containment requirements to the 32 Pre-2008 Exclusions, and such deferral does not create jurisdiction in this Court.

The Court likewise lacks jurisdiction to hear most of Environmental Petitioners' arguments because Environmental Petitioners lack standing to challenge the majority of the Pre-2008 Exclusions. They do not even attempt to establish standing for 26 of the 32 Pre-2008 Exclusions, do not establish the necessary informational injury with regard to EPA's deferral of proposed notification requirements for the Pre-2008 Exclusions, and try but fail to establish standing to challenge exclusions for oil-bearing hazardous secondary materials produced at refineries and for scrap and precious metals.

Substantively, Environmental Petitioners' challenge to the 2015 Rule fails for several reasons. First, their attacks upon EPA's deferral of action with regard to the Pre-2008 Exclusions and upon the exclusion for hazardous secondary materials transferred to a verified reclamation facility, 80 Fed. Reg. 1694, 1775-77 (Jan. 13, 2015) (to be codified at 40 C.F.R. § 261.4(a)(24)-(25)) ("Verified Recycler Exclusion"), fail to recognize that RCRA authorizes EPA to regulate only "solid waste," which the statute defines as "discarded" materials. 42 U.S.C. § 6903(27). RCRA cannot plausibly be understood to *require* EPA to issue conditions or limitations that allegedly would prevent materials from being discarded at some future point.

Moreover, Environmental Petitioners cannot successfully argue that EPA acted arbitrarily and capriciously when it deferred the addition of notification and containment requirements to the Pre-2008 Exclusions because the agency's action reflects reasoned decision making. EPA issued a proposal in 2011 regarding the Pre-2008 Exclusions, listened to the resulting comments from the public, including the regulated community, made a reasoned decision to defer action, and explained its reasoning clearly. EPA then explained its plan for its next steps with regard to the potential addition of notification and containment requirements to the Pre-2008 Exclusions. This course of action is well supported by law and the administrative record.

Likewise, Environmental Petitioners have not identified any procedural or substantive defect in EPA's action finalizing the Verified Recycler Exclusion, and that action did not suffer from the procedural or substantive defects that Environmental Petitioners assert. The Verified Recycler Exclusion was a logical outgrowth of EPA's proposal to abolish or revise the Transfer-Based Exclusion. As a practical matter, the Verified Recycler Exclusion is an enhanced version of the Transfer-Based Exclusion. EPA reasonably chose not to wholly abandon the Transfer-Based Exclusion, because it agreed with comments arguing that abolishing the exclusion would be arbitrary and capricious, potentially leading to a significant increase in landfilling.

By failing to press the precise argument during the rulemaking, Environmental Petitioners waived their argument that materials that generators “pay to have hauled away” are “discarded” under the term’s plain meaning. In any event, EPA never found that generators transferring materials for recycling typically pay to have the materials “hauled away.” EPA did – consistent with its longstanding policy – reasonably decline to adopt a strict value-based approach to defining “solid waste.”

Environmental Petitioners have not shown that EPA lacks any authority to promulgate conditional exclusions from RCRA regulation. Moreover, materials recycled under the extensive conditions of the Verified Recycler Exclusion cannot plausibly be viewed as “discarded.” Accordingly, Environmental Petitioners’ challenge to EPA’s authority to promulgate the exclusion is baseless.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER ENVIRONMENTAL PETITIONERS’ CHALLENGES TO THE PRE-2008 EXCLUSIONS.

A. EPA’s deferral is not reviewable by the D.C. Circuit under RCRA § 7006(a)(1).

RCRA affords this Court jurisdiction to review only three types of actions by EPA – “the promulgation of final regulations, the promulgation of requirements, and the denial of petitions for the promulgation, amendment or repeal of RCRA regulations.” *Am. Portland Cement All.*, 101 F.3d at 775 (citing RCRA § 7006(a)(1)). This Court lacks jurisdiction under RCRA to review EPA

actions where EPA has only announced its “intent to establish law and policy in [the] future. . . .” *Id.* at 777. Where EPA’s stated intent is “to defer law and policymaking,” EPA is not promulgating a final regulation or requirements under RCRA § 7006 (a)(1) (and not denying any type of petition), and this Court cannot review EPA’s deferral. *Am. Portland Cement*, 101 F.3d at 777 (citing *Pub. Citizen, Inc. v. U.S. Nuclear Regulatory Comm’n*, 940 F.2d 679, 682-83 (D.C. Cir. 1991) (citations omitted)). *See also Am. Petroleum Inst. v. EPA*, 216 F.3d 50, 68-69 (D.C. Cir. 2000) (“*API II*”) (holding that EPA decision to defer a RCRA listing determination was a “deferral of rulemaking, not a final rule” and not reviewable).

In EPA’s 2011 Proposal, the agency proposed adding notification and containment requirements to the 32 Pre-2008 Exclusions. EPA then solicited public comment on this proposal, evaluated it in the context of the many comments that were submitted, and adopted the 2015 Rule. In that rule, EPA chose – as it did in *American Portland Cement* and *API II* – to “defer law and policymaking” on the proposal to add notification and containment requirements to the 32 Pre-2008 Exclusions. The agency explained itself unambiguously:

[II.]F. Deferral on Revisions to Pre-2008 Recycling Exclusions

EPA is not finalizing revisions to the pre-2008 recycling exclusions and exemptions to include the contained standard or to require notification. EPA is instead deferring action until EPA can more adequately address commenters’ concerns.

80 Fed. Reg. at 1696 (footnote omitted).

The Environmental Petitioners reject EPA's description of its action. They mischaracterize EPA's deferral of its proposal to add notification and containment requirements to the 32 Pre-2008 Exclusions as a "decision not to revise" the exclusions, which they contend is a "reviewable final action" allegedly because the agency's action "marks the consummation of EPA's decision making process in this rulemaking. . . ." Env'tl. Pet'rs Open. Br. at 20-21.

Environmental Petitioners are wrong. From the face of the 2015 Rule, it is clear that EPA's deferral is not the "consummation" of EPA's decision making. With regard to the proposed containment requirement, after reviewing the comments submitted on the 2011 Proposal, EPA stated in the 2015 Rule that "simply applying the contained standard wholesale across the 32 recycling provisions, may not be the most efficient or effective course of action as EPA would not be considering how the contained standard would work within each specific exclusion and its existing conditions." 80 Fed. Reg. at 1766.

As for the proposed notification requirement, after reviewing the comments, EPA stated that it believed that the proposed notification process for the Pre-2008 Exclusions would pose "challenges" for companies subject to such exclusions, some of which have been in place for decades, and for states that would have to review such notifications. *Id.* EPA added that its lack of data on how many

facilities are currently employing these exclusions prevents the agency from determining whether the addition of the notification standard would be “environmentally beneficial.” *Id.* In effect, EPA recognized that adding the proposed notification and containment requirements based on the administrative record before it would have been arbitrary and capricious.

Based on this analysis, EPA decided with regard to these two proposed requirements that “EPA is deferring action” on applying them to the Pre-2008 Exclusions “until we can more adequately address commenter’s concerns.” *Id.* Elsewhere, EPA stated that before it would take any final action on the addition of the proposed notification and containment requirements to the Pre-2008 Exclusions, it would “provide the regulated community, as well as other stakeholders the opportunity for notice and comment.” *Id.* at 1741. For these reasons, EPA’s deferral of the application of the proposed notification and containment requirements to the Pre-2008 exclusions is not the promulgation of “final regulations or requirements,” and therefore not subject to review by this Court under RCRA § 7006(a)(1).

Environmental Petitioners further argue that EPA’s deferral has “severe legal consequences” because the deferral “leaves in force” the existing Pre-2008 Exclusions pending further action, thereby justifying judicial review. *Env’tl. Pet’rs Open. Br.* at 21. Acceptance of this argument would mean that any decision by

EPA not to proceed at any time with, or to defer, a proposed rulemaking to modify a regulation that was previously adopted, regardless of what is in the record and EPA's future plans, would be reviewable under RCRA § 7006(a)(1), because any such decision would necessarily leave in force the existing regulation. Such a position is inconsistent with the law of this circuit, which recognizes that EPA can defer a rulemaking decision to a later time, and that such deferral is not reviewable by this Court. *Am. Portland Cement*, 101 F.3d at 775; *API II*, 216 F.3d at 68-69.

B. Environmental Petitioners lack standing to challenge most of the Pre-2008 Exclusions.

1. Environmental Petitioners have not attempted to establish standing to challenge 26 of the 32 Pre-2008 Exclusions.

Environmental Petitioners have made no attempt to demonstrate injury-in-fact resulting from 26 of the Pre-2008 Exclusions and therefore lack Article III standing to challenge those 26 provisions.

“For Article III standing, a petitioner must show that (1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *API II*, 216 F.3d at 63 (quoting *Friends of the Earth, Inc. v. Laidlaw Env'tl. Services, Inc.*, 528 U.S. 167, 180-81 (2000)) (quotations omitted). “An organization has standing to sue on

behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* (quoting *Hunt v. Washington State Apple Advert Comm'n.*, 432 U.S. 333, 343 (1977)) (quotations omitted).

The standing doctrine bars organizations from challenging exclusions that do not affect them or their members. *See, e.g., Fednav, Ltd. v. Chester*, 547 F.3d 607, 614 (6th Cir. 2008) ("Our determination of standing is both plaintiff- and provision-specific. . . ."). *See also Allen v. Wright*, 468 U.S. 737, 752 (1984) ("the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.").

Moreover, a party cannot claim standing to bring a broad array of claims based solely on injury-in-fact resulting from a mere subset of those claims. The Supreme Court has explained that:

[S]tanding is not dispensed in gross. If the right to complain of one administrative deficiency automatically conferred the right to complain of all administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review.

Lewis v. Casey, 518 U.S. 343, 358 n.6 (1996). *See also NRDC v. Pena*, 147 F.3d 1012, 1024 n.4 (D.C. Cir. 1998) ("[E]ven if the appellees can establish standing

based on their proximity to [National Ignition Facility] and resulting exposure to hazardous emissions, that would provide no basis to enjoin the Department from using those portions of the report that recommend conducting experiments at [other] sites. . . .”); 13 Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3531 (2d ed. Supp. 2000)) (“A party with standing to advance one claim may lack standing to advance other claims. . . .”).

Environmental Petitioners allege injury-in-fact based on six of the 32 Pre-2008 Exclusions.³ Environmental Petitioners do not allege standing with respect to the 26 other Pre-2008 Exclusions, and so lack standing to challenge them.

2. The absence of a notification requirement in all of the Pre-2008 Exclusions is not a cognizable “informational injury.”

Environmental Petitioners allege that “the lack of a notice requirement [in all of the Pre-2008 Exclusions] deprives [an association member] of important information she needs to protect herself from risks to her health.” Env’tl. Pet’rs Open. Br. at 29. This is arguably an allegation of “informational injury,” which

³ Specifically, Environmental Petitioners allege injury-in-fact with respect to (1) 40 C.F.R. § 261.4(a)(13) (scrap metal); *see* Env’tl. Pet’rs Open. Br., Addenda at 13 (Fontenot Decl. ¶ 5); *id.* at 22 (Herron Decl. ¶ 5); *id.* at 40 (Williams Decl. ¶ 8); *id.* at 30 (Jesse Marquez Decl. ¶ 4); (2) 40 C.F.R. § 261.6(a)(3)(ii) (scrap metal); *id.* at 40 (Williams Decl. ¶ 8); *id.* at 30 (Marquez Decl. ¶ 4); (3) 40 C.F.R. § 261.4(a)(12) (petroleum refinery processing of oil-bearing hazardous secondary materials and recovered oil); *id.* at 14 (Fontenot Decl. ¶ 8); (4) 40 C.F.R. §§ 273.2 and 266 subpart G (lead-acid batteries); *id.* at 22 (Herron Decl. ¶ 5); (5) 40 C.F.R. § 261.7 (empty containers); *id.*; and (6) 40 C.F.R. § 266 subpart F (precious metals); *id.* at 39 (Williams Decl. ¶ 7).

may confer standing where a government's failure to provide information to the public specially affects that party. *See Akins v. Fed. Election Comm'n*, 101 F.3d 731, 735 (D.C. Cir. 1996), *vacated on other grounds*, 524 U.S. 11 (1998).

Informational injury, however, is narrowly defined, *id.*, and is sufficient to create standing “only in very special statutory contexts, where a statutory provision explicitly create[s] a right to information.” *Friends of Animals v. Jewell*, 115 F. Supp. 3d 107, 113 (D.D.C. 2015) (quoting *Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496, 502 (D.C. Cir. 1994)) (quotations omitted). Injury-in-fact requires “more than allegations of damage to an interest in seeing the law obeyed or a social goal furthered.” *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995) (quotations omitted). This Court draws a distinction between “requests for information concerning ‘whether a violation of the law has occurred’ (the denial of which would *not* satisfy the injury-in-fact requirement), and requests for specific information such as ‘how much money a candidate spent in an election’ (the denial of which *could* constitute a cognizable injury).” *Friends of Animals*, 115 F. Supp. 3d at 113 (quoting *Common Cause v. FEC*, 108 F.3d 413, 417-18 (D.C. Cir. 1997)).

Here, Environmental Petitioners cite no provision of RCRA that “explicitly create[s] a right to information.” *Friends of Animals*, 115 F. Supp. 3d at 113. Rather, Environmental Petitioners claim standing on the grounds that they – as

members of the public – would generally benefit from more information about the regulated community’s compliance with RCRA and the Pre-2008 Exclusions. This is a “request for information concerning ‘whether a violation of the law has occurred,’” and does not confer standing. *Id.*

3. Environmental Petitioners fail to link § 261.4(a)(12) to any actual or imminent injury to their members.

Relying upon the Declaration of William Fontenot, Environmental Petitioners attempt to show standing to challenge the exclusion in 40 C.F.R. § 261.4(a)(12) for oil-bearing hazardous secondary materials that are produced at refineries and reinserted into refinery processes. *Envtl. Pet’rs Open. Br.* at 25, 29-30. That effort fails, because Mr. Fontenot has not provided any evidence linking the exclusion to any actual or imminent injury to himself.

Mr. Fontenot states that he lives near a refinery and visits areas near other refineries; that there have been accidents at some of the refineries resulting in pollution of air and water, personal injury, and property damage; and that he breathes emissions from the refineries. *Fontenot Decl.* ¶¶ 8-10. But Mr. Fontenot offers no evidence that those refineries actually rely upon the § 261.4(a)(12) or any other exclusion. And even assuming that the refineries are relying upon the exclusion, there is no evidence that such reliance has caused or exacerbated any accidents or harmful emissions from the refineries.

Mr. Fontenot asserts that EPA correlated § 261.4(a)(12) to environmental damage, Fontenot Decl. ¶ 8 – but that is not accurate. EPA *attempted* to correlate the exclusion with environmental damage, but as American Petroleum Institute pointed out in its comments, the sole damage case EPA relied upon occurred at one “Don’s Recycling” (“aka ‘A1 Salvaged Auto Parts’”) – an automobile junkyard with no connection to petroleum refining operations. Comments 10-11 [JA 602-03]. See EPA, *Correlation of Recycling Damage Cases with Regulatory Exclusions, Exemptions or Alternative Standards* 5, 9, 15, 18 (2011) (“Correlation Study”), EPA-HQ-RCRA-2010-0742-0010 [JA 565, 569, 575, 578]; EPA, *An Assessment of Environmental Problems Associated with Recycling of Hazardous Secondary Materials* (“Environmental Problems Study”), Appendix 2 at 83 (2007), EPA-HQ-RCRA-2002-0031-0355.2 [JA 479].⁴

⁴ EPA responded to American Petroleum Institute’s exposure of this shoddy science, thus: “Regarding . . . comments on specific damage case-to-exclusion pairings . . . EPA agrees with commenters that more information is needed prior to taking final action” EPA, *Revisions to the Definition of Solid Waste Final Rule Response To Comments Document Summaries and Responses* (“Response to Comments”), 259, 261 (2014), EPA-HQ-RCRA-2010-0742-0372 [JA 1142, 1144]. Also, while the Correlation Study listed eight likely damage case-to-exclusion pairings, Correlation Study 8-9 & Table 2 [JA 568-69], EPA reduced that number to seven in the Response To Comments – albeit without explanation. Response To Comments 260 [JA 1143]. See also 80 Fed. Reg. at 1741 (“EPA could only correlate with confidence 7 of the 32 recycling exclusions to damage cases. . . .”).

Because there is no evidence of a connection between any ongoing harm to Mr. Fontenot and the particular activity to which he objects, Environmental Petitioners have failed to establish standing based on actual injury to their members. *See API II*, 216 F.3d at 68 (D.C. Cir. 2000) (“[T]he environmental petitioners have failed to link the practices complained of to alleged harms or imminent harms to their members, and thus have failed to establish that they have standing”).

The Supreme Court’s decision in *Laidlaw* set a seemingly low bar for environmental plaintiffs alleging actual injury, but that case at least involved both (1) pollution indisputably connected to the challenged activity and (2) a change in environmental plaintiffs’ behavior in response to the pollution. *See NRDC v. EPA*, 489 F.3d 1364, 1370-71 (D.C. Cir. 2007) (citing two elements in *Laidlaw*: (1) observation of pollution and (2) alteration of behavior in response). Here, no connection has been made between pollution and the particular activity challenged. Moreover, while Mr. Fontenot expresses concerns about pollution, he does not state that he has altered his behavior in response to those concerns.

Beyond the question of actual injury, Mr. Fontenot expresses concern that § 261.4(a)(12) may cause an increased *risk* that he will be harmed sometime in the future. Fontenot Decl. ¶¶ 8, 9. But he does not set forth facts sufficient to show *imminent* injury to himself traceable to § 261.4(a)(12).

In the first place, an allegation of increased risk is not – in and of itself – an injury for standing purposes. As this Court has explained,

[W]ere all purely speculative increased risks deemed injurious, the entire requirement of actual or imminent injury would be rendered moot, because all hypothesized, nonimminent injuries could be dressed up as increased risk of future injury.

Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin., 489 F.3d 1279, 1298 (D.C. Cir. 2007) (citation omitted).

Instead, this Court has said that in increased risk cases, the ultimate alleged harm (e.g., injury or property damage) must be considered the concrete and particularized injury, and the Court must then “determine whether the increased risk of such harm makes injury to an individual citizen sufficiently ‘imminent’ for standing purposes.” *Id.* To find “imminent” injury, the Court must be satisfied that petitioners have shown “both (i) a *substantially* increased risk of harm and (ii) a *substantial* probability of harm with that increase taken into account.” *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 914 (D.C. Cir. 2015) (quoting *Pub. Citizen*, 489 F.3d at 1295).

Here, Mr. Fontenot would need to set forth facts establishing both (1) that § 261.4(a)(12) itself *substantially* increases the risk that he will suffer personal injury or property damage compared to a scenario where the refineries operate without benefit of the exclusion, and (2) that there is a *substantial* probability that

he will actually suffer injury, given that increase in risk. *See Food & Water Watch*, 808 F.3d at 915. While Mr. Fontenot expresses concerns about the alleged risks posed by refinery operations generally, he offers no facts to support a substantial increase in risk traceable to § 261.4(a)(12), or a substantial probability that he will actually be harmed as a result of § 261.4(a)(12).

Nor is Mr. Fontenot's concern that § 261.4(a)(12) denies him procedural opportunities a cognizable injury. *See Fontenot Decl.* ¶ 17. Because he has not shown a concrete injury traceable to § 261.4 (e.g., personal injury or property damage), the alleged loss of procedural opportunities will not support standing. “[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation – a procedural right *in vacuo* – is insufficient to create Article III standing.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009).

Because Environmental Petitioners have not established standing to challenge § 261.4(a)(12), the Court lacks jurisdiction over that challenge.

4. Environmental Petitioners lack standing to challenge the exclusions for scrap metal and precious metals.

Environmental Petitioners also contest EPA's decision to retain Pre-2008 Exclusions for “scrap metal,” 40 C.F.R. §§ 261.4(a)(13), 261.6(a)(3)(ii); and certain precious metals, 40 C.F.R. § 266 subpart F. But for reasons similar to those discussed above for oil-bearing hazardous secondary materials, Environmental Petitioners have not shown the concrete, actual and imminent injury necessary for

standing. *See Nat'l Ass'n of Home Builders v. U.S. Fish & Wildlife Serv.*, 786 F.3d 1050, 1054 (D.C. Cir. 2015). Environmental Petitioners do not show or even allege that the identified facilities actually rely on the exclusions, or show that such reliance causes or exacerbates their alleged injuries and subjective fear of harm.

Environmental Petitioners “only speculate as to whether the [scrap yards or a precious metals recycling facility near them] will seek to use. . .” the exclusions. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1149 (2013). Declarants allege physical proximity to certain facilities, and express a subjective fear that the mere existence of the exclusions increases their risk of injury. But no declarant alleges that the specific scrap yards or precious metals recycling facilities *actually* rely on the exclusions; they state merely that the facilities potentially “could use” them. *See* Fontenot Decl. ¶ 5; Herron Decl. ¶ 11; Marquez Decl. ¶ 19; Williams Decl. ¶¶ 7-8.

Declarants do not support their speculation that the particular facilities will use the exclusion, or that such use will lead to a “substantially increased risk of harm” to them, and “a substantial probability of harm with that increase taken into account.” *Food & Water Watch*, 808 F.3d at 914. Declarants assert that EPA “correlated” historic environmental damage incidents to the exclusions. *E.g.*, Fontenot Decl. ¶¶ 4-5; Herron Decl. ¶¶ 3-6; Williams Decl. ¶¶ 6-8. But even EPA now concedes that its “flawed” Correlation Study “did not verify whether the

specific damage incidents occurred at facilities that had claimed an exclusion, and if so, if that exclusion was the underlying cause of the damage.” Resp’t EPA Br. 96 (citing 80 Fed. Reg. at 1766-67). In any case, events that occurred years or even decades ago do not establish a “substantial risk” or a “certainly impending” future injury. *Clapper*, 133 S. Ct. at 1147; *cf.* Herron Decl. ¶¶ 4-6 (speculating that Diamond State Recycling “can use” the scrap-metal exclusion because a different facility that has been closed for years, but that declarant speculates could be “related,” had issues with “polychlorinated biphenyls” and “oily waste”); Williams Decl. ¶ 11 (referencing pollution in the Rosamond area “[i]n the 1970s and 1980s”).⁵

As in other cases where petitioners unsuccessfully relied on a string of inferences dependent on actions of third parties, because § 261.4(a)(13) and 40 C.F.R. § 266 subpart F “at most *authorize*[] – but do[] not *mandate* or *direct* – the [use of the exclusions] that [Environmental Petitioners] fear, [their] allegations are necessarily conjectural.” *Clapper*, 133 S. Ct. at 1149. A mere “subjective fear” that certain facilities are not handling scrap metal or materials containing precious

⁵ National Metals and Surplus (Williams Decl. ¶ 8) was not one of the Rosamond sites identified in EPA’s study. *See* Environmental Problems Study, Appendix 2 at 30, 38 [JA 476-77]. The Cooper Drum Company (Williams Decl. ¶ 11) handles reconditioned drums, and does not implicate the scrap-metal exclusion. *See id.* Appendix 1 at 1 [JA 464].

metals in a manner consistent with full RCRA regulation “does not give rise to standing.” *Id.* at 1153; *see also* Fontenot Decl. ¶ 6 (“I worry that this is happening at the scrap metal yards near my home. . . .”).

Some declarants allege they have curtailed their recreational and other outdoor activities out of fear of pollution. *See, e.g.,* Marquez Decl. ¶ 13 (less time outside); Williams Decl. ¶ 14 (similar); *but cf.* Herron Decl. ¶ 12 (will “continue [her outdoor] activities”). Such “self-inflicted injuries” are insufficient unless they are “fairly traceable” to the disputed conduct – not shown here. *See Clapper*, 133 S. Ct. at 1152; *Home Builders*, 786 F.3d at 1054. Allegations of injury to others – “firemen” and first-responders (Fontenot Decl. ¶ 11) or “family and community members” (Marquez Decl. ¶ 10) – are plainly impermissible attempts to assert “the legal rights or interests of third parties.” *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013) (quotation omitted).

II. ENVIRONMENTAL PETITIONERS’ CHALLENGES SHOULD BE DENIED BECAUSE THEY MISUNDERSTAND AND IGNORE LONG-SETTLED AND CLEAR LIMITS ON EPA’S RCRA JURISDICTION.

RCRA defines the jurisdictional term “solid waste” to mean “discarded” materials. Under this Court’s controlling precedent, “discarded” means “disposed of, thrown away, or abandoned.” *Ass’n of Battery Recyclers v. EPA*, 208 F.3d 1047, 1053 (D.C. Cir. 2000).

In attacking EPA's decision to defer the addition of notification and containment requirements to the Pre-2008 Exclusions and to seek invalidation of the Verified Recycler Exclusion, Environmental Petitioners argue that RCRA *requires* EPA to regulate certain substances, and to impose regulatory conditions and requirements on such materials, to prevent their hypothetical *future* discard.

For instance, Environmental Petitioners argue that EPA's 2015 Rule is "unlawful" because it did not impose "notification" and "containment requirements" on all of the Pre-2008 Exclusions to "protect against discard" of materials that might, someday, be discarded. *See* Env'tl. Pet'rs Open. Br. at 46-47, 48-52. Environmental Petitioners further assert that the Verified Recycler Exclusion is unlawful because it "fails to ensure against discard," *id.* at 39, arguing that RCRA requires EPA to impose "prescriptive design, operating, inspection, and closure standards" on all materials relevant to that exclusion, *id.* at 42. *See also id.* at 38-39 (arguing that EPA had obligation to explain "why the[] conditions [on the Verified Recycler Exclusion] prevent discard from occurring. . . ."). Finally, Environmental Petitioners generally assert that EPA must address through RCRA certain "environmental and human health risks" supposedly associated with materials that have *not yet been discarded*, and impose conditions that "adequately assur[e] that discard . . . will not occur" in the future. *Id.* at 41.

However, RCRA cannot plausibly be understood to *require* EPA to regulate materials that have not yet been discarded or to impose RCRA duties and obligations to prevent materials from hypothetically becoming discarded in the future. Such regulation is exactly the opposite of the statute Congress enacted. *See* 42 U.S.C. § 6903(27) (defining “solid waste” as “garbage, refuse, sludge[s] . . . and other discarded material”); *Am. Min. Cong. v. EPA*, 824 F.2d 1177, 1186 (D.C. Cir. 1987) (EPA lacks RCRA jurisdiction over materials that “have not yet become part of the waste disposal problem”). As a result, Environmental Petitioners are incorrect to assert that RCRA requires EPA to regulate in-process materials, or other materials that, while no longer in-process, are destined for reuse or recycling.

Elsewhere in their brief, Environmental Petitioners concede as much, acknowledging that “EPA’s RCRA obligations extend only to materials that are ‘solid waste’ as RCRA defines that term, *i.e.*, to ‘any garbage, refuse, sludge . . . and other discarded material[.]’” *Envtl. Pet’rs Open. Br.* at 5. That concession, which aligns with the plain statutory text and this Court’s precedent, forecloses their later claims that EPA is obligated to regulate materials to prevent future discard. That fundamental misunderstanding of EPA’s regulatory jurisdiction under RCRA is a sufficient ground to reject the Environmental Petitioners’ attempt to impose additional regulatory conditions and requirements (such as notification

or containment) on the Pre-2008 Exclusions and to seek invalidation of the Verified Recycler Exclusion.

III. EPA’S DEFERRAL OF ACTION ON THE PRE-2008 EXCLUSIONS WAS SUPPORTED BY THE LAW AND THE RECORD.

Environmental Petitioners argue that EPA’s decision to defer action on the proposed addition of notification and recordkeeping requirements to the Pre-2008 Exclusions was arbitrary and capricious because the decision was not adequately explained or supported in the record. *See* Env’tl. Pet’rs Open. Br. at 48-52. Even if EPA’s deferral decision were reviewable (which, as discussed *supra* at § I.A., it is not), the record itself belies Environmental Petitioners’ claims. That record shows that the agency listened to the comments of the regulated community regarding the basis for its proposal, considered those comments, and made a reasoned decision to further think through the issue before making a final decision on that proposal.

This Court should not discourage this kind of thoughtful deliberation by an agency.

The Supreme Court has explained that agency rules are arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *PhRMA v. FTC*, 790 F.3d 198, 209 (D.C. Cir. 2015)

(quoting *Motor Vehicle Mfr. Ass'n of the United States, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29 (1983)). EPA has done none of those things here.

EPA's original proposal to add notification and containment requirements to the Pre-2008 Exclusions was based on an "environmental problems study" of "damage" cases which allegedly resulted from recycling activity. *See* Environmental Problems Study [JA 450]. In response to the 2011 Proposal, many commenters argued that the proposed addition of notification and containment requirements to the Pre-2008 Exclusions was not supported by this study. For instance, commenters pointed out that while EPA proposed to add notification and containment provisions to all 32 Pre-2008 Exclusions, EPA had only identified seven exclusions as correlated to the recycling damage cases. 80 Fed. Reg. at 1740. Other commenters noted that any "correlations" alleged by EPA were not well supported. *Id.*

EPA listened. Moreover, the agency did what agencies should do when confronted with persuasive arguments by commenters, including the regulated community: The agency paused for further thought, while identifying a specific next step along the path to further notice and comment and ultimate final action.

Specifically, in the 2015 Rule, EPA largely agreed with commenters that its proposal to add notification and containment requirements to the Pre-2008 Exclusions was not adequately supported by the Environmental Problems Study.

The agency conceded that “more information is needed prior to taking final action on specific conditions proposed [the notification and containment requirements] of the pre-2008 recycling provisions.” 80 Fed. Reg. at 1741. EPA then suggested a reasonable near-term plan, concluding that it might need to address the Pre-2008 Exclusions one-by-one rather than *en masse*. *Id.* The agency therefore announced that it would not finalize the proposed additions to the Pre-2008 Exclusions, and that it would instead be “deferring action until EPA can more adequately address commenters’ concerns. . . .” *Id.*

This deferral was not implausible, ill-considered, or counter to evidence. The opposite is true: EPA determined that to take action on the basis of inadequate evidence would be precipitous, and declined to do so. EPA’s deferral of action on this addition of the proposed notification and containment requirements to the Pre-2008 Exclusions was correct, and the antithesis of an arbitrary and capricious act. Indeed, it avoided one.

IV. ENVIRONMENTAL PETITIONERS’ CHALLENGES TO THE VERIFIED RECYCLER EXCLUSION LACK MERIT.

Environmental Petitioners argue that the Verified Recycler Exclusion is unlawful because it was promulgated without notice and the opportunity to comment, and because the 2015 Rule violated RCRA and the Administrative Procedure Act by continuing to exclude from the definition of solid waste certain materials that are transferred to another party for purposes of reclamation. *See*

Envtl. Pet'rs Open. Br. at 30-43. Not only are these two arguments without merit, they are in conflict. Environmental Petitioners cannot credibly argue that the Verified Recycler Exclusion was sprung on them without notice in the 2015 Rule while at the same time arguing that the exclusion impermissibly perpetuates a regulatory framework that had been in existence since 2008.

A. The Verified Recycler Exclusion was a logical outgrowth of the 2011 Proposal.

Environmental Petitioners argue that the Verified Recycler Exclusion violated the Administrative Procedure Act because EPA failed to provide interested parties a “notice and comment opportunity.” Env'tl. Pet'rs Open. Br. at 30. According to Environmental Petitioners, EPA's ultimate decision in the 2015 Rule to amend rather than wholly abandon the Transfer-Based Exclusion was not a logical outgrowth of the 2011 Proposal. Env'tl. Pet'rs Open. Br. at 31.

No court, however, has determined, as Environmental Petitioners seemingly urge, that proposed and final rules must be identical. *See Ass'n of Private Sector Colleges v. Duncan*, 681 F.3d 427, 461 (D.C. Cir. 2012) (*citing CSX Transportation, Inc. v. Surface Transportation Board*, 584 F.3d 1076, 1079-80 (D.C. Cir. 2009)). As explained therein:

A final rule qualifies as a logical outgrowth if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period. By contrast, a final rule fails the logical

outgrowth test and thus violates the [Administrative Procedure Act's] notice requirement where interested parties would have had to divine [the agency's] unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.

Id. (citation omitted). Here, interested parties had adequate notice that EPA would amend, rather than entirely abandon, the 2008 Transfer-Based Exclusion. Indeed, based on the comments EPA received, the agency was all but compelled to amend its proposed approach.

1. EPA provided adequate notice that the Agency might ultimately amend, rather than abandon, the Transfer-Based Exclusion.

As far back as the initial public meeting notice, EPA apprised parties that the agency would potentially “revise or clarify” the Transfer-Based Exclusion. 74 Fed. Reg. 25,200, 25,203 (May 27, 2009) [JA 188, 191]. While the 2011 Proposal offered as a possible approach largely abandoning the Transfer-Based Exclusion, EPA also observed that certain specific conditions could appropriately allow for the continued transfer of hazardous secondary materials for reclamation. 76 Fed. Reg. at 44,108 [JA 218]. To that end, the 2011 Proposal requested comment on EPA’s proposed approach, but also noted the agency’s particular interest in “alternative approaches” to EPA’s proposal. *Id.* at 44,110 [JA 220].

Environmental Petitioners may not like the Verified Recycler Exclusion, but they cannot claim surprise. In fact, the Environmental Petitioners submitted

comments addressing their concern with the conditional Transfer-Based Exclusion. *See Earthjustice et. al* Comments at 4 [JA 846]. Far from being blindsided by a “surprisingly different” final rule, Environmental Petitioners “anticipated that the change was possible,” and thus “filed their comments on the subject during the notice-and-comment period.” *See CSX Transportation*, 584 F.3d at 1079.

The Verified Recycler Exclusion is – as a practical matter – an enhanced version of the 2008 Transfer-Based Exclusion. Both rules contain similar conditions (*e.g.*, speculative accumulation, containment, recordkeeping, financial assurance). That the 2015 Rule amended the application or stringency of those conditions, rather than totally ignoring them, was clearly within the scope of the proposal and was understood by the Environmental Petitioners. The 2015 Rule was therefore both a foreseeable and logical outgrowth of the 2011 Proposal.⁶

2. The comments EPA received during the rulemaking apprised EPA that abandoning the Transfer-Based Exclusion would be arbitrary and capricious.

It is not enough for EPA simply to allow for comment on a proposed course action – the agency must actually consider the comments and act accordingly. *See Ass’n of Battery Recyclers, Inc. v. EPA*, 208 F.3d at 1058-59. Here, EPA received

⁶ Industry Petitioners and several Industry Intervenors maintain that some conditions of the exclusion are substantively unlawful because they go far beyond defining “discard” (or its absence). But that does not affect the exclusion’s status as a logical outgrowth of the 2011 Proposal for Administrative Procedure Act notice and comment purposes.

information explaining how the 2011 Proposal overstated the risk posed by transfer-based reclamation and would undermine RCRA's goal of increased recycling and reclamation. Consideration of this information not only made EPA's decision to alter its proposed approach permissible – it made that decision necessary.

a. Comments explained that abandoning the Transfer-Based Exclusion was unjustified.

The 2011 Proposal proposed to abandon the Transfer-Based Exclusion on the grounds that it “failed to take into account how the conditions of the 2008 transfer-based exclusion would work when actually implemented.” 76 Fed. Reg. at 44,109 [JA 219]. But, as commenters like Metals Industries Recycling Coalition pointed out, EPA's actions discouraged states from implementing the agency's 2008 Revisions to the Definition of Solid Waste rule, 73 Fed. Reg. 64,668 (Oct. 30, 2008) (“2008 Rule”) [JA 65]. *See* Metals Industries Recycling Coalition Comments at 5 [JA 790]. Within months of promulgation, EPA signaled that it would reopen and amend the 2008 Rule. *See* Metals Industries Recycling Coalition Comments at 5 [JA 790]; 80 Fed. Reg. at 1700 [JA 271]. As a result, few states saw any point in implementing the 2008 Rule.

One of the few states that did implement the 2008 Rule (Pennsylvania) was able in its comments on the 2011 Proposal to provide data on the protectiveness of the 2008 Rule as “actually implemented.” 80 Fed. Reg. at 1707 [JA 278].

Specifically, the Pennsylvania Department of Environmental Protection, which oversaw more than 41 percent of the facilities operating under the Transfer-Based Exclusion, reported that it had “experienced no compliance problems or issues of any nature with those generators or reclamation facilities operating under . . . the transfer-based exclusion.” *Id.* at 1708 [JA 279].

The absence of compliance issues observed by Pennsylvania Department of Environmental Protection reflects the position of other commenters, who noted that EPA’s Correlation Study hardly reflected real-world risks because, *inter alia*, it largely examined damages caused by: (1) operations in existence well before the advent of RCRA or other modern environmental laws; (2) operations that did not utilize management practices or environmental controls that are now routine and widespread; and (3) substances and equipment that are no longer in use today. *See* Metals Industries Recycling Coalition Comments at 30-32 [JA 815-17].

b. Comments explained that abandoning the Transfer-Based Exclusion would result in more landfilling.

The purpose of RCRA is not only to protect against the improper disposal of solid and hazardous wastes but also to protect the environment and valuable resources by encouraging recycling and reuse. *See Am. Min. Cong. v. EPA*, 824 F.2d at 1179. To that end, numerous commenters apprised EPA of the potentially chilling effect on recycling of entirely abandoning the Transfer-Based Exclusion.

In particular, Metals Industries Recycling Coalition commented that approximately 23,000 tons of electric arc furnace dust, which can contain 15-20 percent recoverable zinc, would likely be landfilled rather than reclaimed if the Transfer-Based Exclusion were abandoned. *See* Metals Industries Recycling Coalition Comments at 6 [JA 791]. Similarly, Pennsylvania Department of Environmental Protection and other commenters provided further real-world examples, noting that at least 32 facilities began using the Transfer-Based Exclusion after its finalization in the 2008 Rule and that, in 2011 alone, 57,000 tons of hazardous secondary materials were reclaimed instead of being sent to landfills and deep well injection facilities. 80 Fed. Reg. at 1708 [JA 279]. No adverse environmental consequences were associated with any of these transfers. Comments like these apprised EPA that the Transfer-Based Exclusion had been achieving its intended purpose of encouraging safe, legitimate recycling. *Id.* Contrary to Environmental Petitioners' assertions, the agency was obligated to consider this information and to adjust the 2011 Proposal accordingly.

B. By failing to present the claim to EPA, Environmental Petitioners waived their claim that materials that companies “pay to have hauled away” are “discarded” under the term’s plain meaning.

Environmental Petitioners argue that hazardous secondary materials that companies “pay to have hauled away” are “discarded” in the ordinary sense of the word, and that EPA has no discretion to exclude such materials from RCRA

regulation under any conditions. Env'tl. Pet'rs Open. Br. at 31-32. As discussed *infra* at § I.C., Environmental Petitioners' use of the phrase "pay to have hauled away" mischaracterizes the record and oversimplifies the economics underlying recycling and reclamation. But Environmental Petitioners have waived their argument, in any event, because they did not present it to EPA during the rulemaking.

Under *Linemaster Switch Corp. v. EPA*, 938 F.2d 1299, 1308-09 (D.C. Cir. 1991), a challenge to EPA's statutory authority may not be raised for the first time on appeal. The Court explained that "excusing petitioners' failure to present statutory challenges to federal agencies for initial resolution . . . would infringe on agencies' rightful role in statutory construction under the *Chevron* framework." *Id.* at 1309. The Court has reaffirmed this principle on many occasions. See *Verizon Tel. Cos. v. FCC*, 292 F.3d 903, 910 (D.C. Cir. 2002); *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 860 (D.C. Cir. 2001); *NRDC v. EPA*, 25 F.3d 1063, 1074 (D.C. Cir. 1994).

When *Linemaster Switch* was decided, the D.C. Circuit had established in Clean Air Act cases that as to *factual, record-based* conclusions, judicial review of EPA's "key assumptions" is available, even in the absence of any relevant public comment during the rulemaking. See *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 534-35 (D.C. Cir. 1983). Later cases reaffirmed this

principle. *See, e.g., N.E. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 948 (D.C. Cir. 2004).

Occasionally, the Court has relied upon the *Small Refiner* line of cases to allow judicial review of statutory claims not raised during the rulemaking, based on the premise that certain statutory claims involve the agency's "key assumptions" in the rulemaking. *See NRDC v. EPA*, 755 F.3d 1010, 1022-23 (D.C. Cir. 2014). But in so doing, the Court has overlooked its controlling precedent in *Linemaster Switch*, and that the *Small Refiner* line of cases originally involved factual, record-based issues – not questions of statutory construction.

The agency's statutory authority for the action it took in *Linemaster Switch* was self-evidently a "key assumption" underlying the action. Thus, *Linemaster Switch* cannot be said to have allowed for an exception to its waiver rule for those cases where the agency's statutory authority is among the EPA's "key assumptions." Accordingly, whether or not the Environmental Petitioners' statutory authority claim involves EPA's "key assumptions" in promulgating the Verified Recycler Exclusion, Environmental Petitioners have waived that claim.

Environmental Petitioners' failure to present their argument to EPA might be excused if they could show that EPA actually considered that specific argument anyway. *See NRDC v. EPA*, 824 F.2d 1146, 1151 (D.C. Cir. 1987). But Environmental Petitioners assert that EPA "fail[ed] even to consider that

companies discard hazardous materials in the ordinary sense when they pay other companies to haul them away. . . .” Env’tl. Pet’rs Open. Br. at 35. If that is true, the fault lies with Environmental Petitioners, not EPA. See *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001) (“An agency cannot be faulted for failing to address such issues that were not raised by petitioners.”).

C. Environmental Petitioners’ argument that EPA lacked authority to promulgate an exclusion for transferred materials is without merit.

Environmental Petitioners urge this Court to set aside the Verified Recycler Exclusion based on a mischaracterization of the record, a misapprehension of the nature of economics underlying recycling, and a failure to recognize this Court’s decisions upholding EPA authority to exclude from the definition of “solid waste” certain materials that are transferred for reclamation. Environmental Petitioners’ arguments have no merit.

1. Environmental Petitioners mischaracterize the record and the economics of recycling and reclamation.

Environmental Petitioners argue that EPA erred because materials that companies “pay to have hauled away” are necessarily “discarded.” See Env’tl. Pet’rs Open. Br. at § I.B. But this argument is based on a mischaracterization of the record, which does not support the conclusion that generators typically pay to have their secondary materials “hauled away.” Instead, EPA found that generators will often “pay the reclamation facility to accept these hazardous secondary

materials or receive a salvage fee that only partially offsets the cost of transporting or managing them.” 76 Fed. Reg. 44,108 [JA 218]. Paying to have materials reclaimed is not the same as paying simply to have materials “hailed away.”

While a generator’s payment in conjunction with a transfer could be indicative of “discard” in some cases, it is overly simplistic and unrealistic to suggest such transfers amount to “discard” *per se*. Indeed, EPA long has specifically declined to adopt a strict value-based approach to defining “solid waste,” for a number of reasons. Rather, EPA has properly recognized that which party pays for transportation, or the overall economics of each recycling transaction, do not determine whether the materials destined for reclamation are in fact discarded.

As a threshold matter, payments from a generator to a reclamation facility do not cause the subject material to be “disposed of,” “thrown away,” or “abandoned” within the plain meaning of that term. Because these materials are not “disposed of,” “thrown away,” or “abandoned” they are not “discarded” and do not become “part of the waste disposal problem.” *See Safe Food & Fertilizer*, 350 F.3d 1263, 1268 (D.C. Cir.2003). To the contrary, the recycling and reuse of materials mitigates the “waste disposal problem” and provides a tremendous environmental benefit even if the generator pays freight or other costs. *See Metals Industries Recycling Coalition Comments*, [JA 798].

Moreover, paying for reclamation can be a rational business decision when weighed against the cost of disposal. Even in the 2011 Proposal, which Environmental Petitioners supported, EPA found that “generators will typically pay the reclamation facility to accept these hazardous secondary materials or receive a salvage fee that only partially offsets the cost of transporting or managing them.” 76 Fed. Reg. at 44,108 [JA 218].

EPA reached the same conclusion in the 2008 Rule, 73 Fed. Reg. at 74,675, and in its 2006 *Study of Potential Effects of Market Forces on the Management of Hazardous Secondary Materials Intended for Recycling* (“Market Forces Study”), (2006), EPA-HQ-RCRA-2015-0147-0039 at 42-43, [JA 445-46]. While the Market Forces Study acknowledged some environmental risks associated with hazardous secondary materials recycling, it too concluded that if the economic value of reclamation, based on numerous variables, is greater than the costs of disposal, firms will avoid the disposal costs and opt for reclamation/recycling. *Id.* A generator that subsidizes a portion of a transfer-based reclamation is still paying for reclamation – it is not paying for discard and it is not contributing to the solid waste disposal problem.

In the petroleum refining industry, for instance, a refiner will pass title to the spent catalysts to a specific reclamation facility, with the intent that the catalysts be reclaimed by that facility to recover metals. *See American Petroleum Institute*

Comments at 47 n.16 [JA 618]. In some cases of regeneration, the fresh catalyst is returned to the generating refinery for reuse. *Id.* at 46 [JA 617]. Management of catalysts through reclamation is a responsible method of managing the catalysts that allows for the recovery of valuable, active metals in the catalysts and avoids the unnecessary disposal of materials with inherent value. While the refiner typically pays a fee to the reclamation facility (for which there is often a rebate or credit depending upon prevailing metals prices), Comments at 28, [JA 483], that hardly suggests the refiner is simply paying to have its catalysts “hailed away.”

In this rulemaking, as before, EPA correctly concluded that a generator’s payment to have secondary materials reclaimed does not make those materials part of the nation’s waste disposal problem or discarded.

2. Environmental Petitioners’ attacks on EPA’s authority are meritless.

Environmental Petitioners do not present, and thus this Court has no occasion to consider, any general challenge to EPA’s authority to conditionally exclude hazardous secondary materials. EPA has approved dozen of exclusions where, as here, the exclusion is premised on observance of some operational, management, or administrative requirements. *See* 40 C.F.R. § 261.4(a).

As this Court explained in *Safe Food & Fertilizer*, this Court has “never said that RCRA compels the conclusion that material destined for recycling in another industry is necessarily discarded” and, in fact, the Court reaffirmed that transfer is

not a good proxy for discard, much less a basis for a presumption of discard. 350 F.3d at 1268. To the contrary, this Court has permitted EPA to exclude materials based on certain conditions aimed at delineating the scope of the exclusion. *Id.* at 1268; compare *Military Toxics Project v. EPA*, 146 F.3d 948, 957-58 (D.C. Cir. 1998) (upholding conditional exclusion from the definition of “hazardous waste”). While Industry Petitioners (and many Intervenors here) argue that EPA overstepped its jurisdiction under RCRA when establishing certain requirements for the Verified Recycler Exclusion that exceed what is necessary to draw the line between “discard” and “non-discard,” Environmental Petitioners have not shown that EPA lacks any authority to issue conditional exclusions under RCRA.

3. Materials recycled pursuant to the Verified Recycler Exclusion are not discarded.

Environmental Petitioners allege that the Verified Recycler Exclusion excuses compliance with requirements necessary to prohibit discard and risks to human health and the environment. *See* Env'tl. Pet'rs Open. Br. at 39. This argument is somewhat mystifying.

As discussed *supra* and in Industry Petitioners' opening brief, EPA's jurisdiction under RCRA is limited to those materials actually “disposed of, abandoned, or thrown away” – not materials productively reused and recycled. *See Am. Min.*, 824 F.2d at 1193; *Safe Food & Fertilizer*, 350 F.3d at 1268. In the 2015 Rule, EPA claimed authority under RCRA to promulgate a Verified Recycler

Exclusion containing certain permitting, approval, storage, and financial assurance requirements for generators and reclaimers of materials that are not “disposed of, abandoned, or thrown away,” but recycled and reused. Without repeating the jurisdictional arguments made herein and elsewhere, Industry Intervenors note only that it makes no sense for Environmental Petitioners to criticize regulatory requirements applicable *only* to materials in the recycling process, and *not discarded*, on the basis that they impermissibly excuse compliance with RCRA’s requirements for materials that *are* “disposed of, abandoned, or thrown away.”

Regardless of whether this Court agrees with Industry Petitioners’ contention that the Verified Recycler Exclusion in certain important aspects exceeds EPA’s authority under RCRA, this Court can and should reject Environmental Petitioners’ arguments. The Verified Recycler Exclusion’s prescriptive verification program, requirements on speculative accumulation, containment requirements, shipment records, and conditions imposed on the recycler (storage, financial assurance, etc.) cannot reasonably be viewed as allowing companies to impermissibly discard materials under the guise of reclamation. Environmental Petitioners have not identified any basis in the record to conclude that a material that is contained and documented as being shipped to an approved reclamation facility with its own prescriptive requirements is being “discarded.”

CONCLUSION

For the foregoing reasons, the Court should dismiss in part and otherwise deny the Environmental Petitioners' petition for review.

Dated: June 20, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rules 32(a)(1) and 32(a)(2)(C), I hereby certify that the foregoing Brief of Industry Intervenor-Respondents contains 8,748 words as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the 8,750 word limit set by the Court.

Dated: June 20, 2016

/s/ Donald J. Patterson, Jr.
Donald J. Patterson, Jr.

CERTIFICATE OF SERVICE

I certify that the foregoing Brief of Industry Intervenor-Respondents was electronically filed with the Clerk of the Court on June 20, 2016 using the CM/ECF system and thereby served upon all ECF-registered counsel.

/s/ Donald J. Patterson, Jr.
Donald J. Patterson, Jr.

ORAL ARGUMENT NOT YET SCHEDULED

No. 09-1038**(and consolidated cases Nos. 15-1083, 15-1085, 15-1088, 15-1089, and 15-1094)**

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

AMERICAN PETROLEUM INSTITUTE,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

**On Petition for Review of Final Regulations
Promulgated by the United States Environmental Protection Agency**

ADDENDUM 1:**PERTINENT STATUTES AND REGULATIONS**

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PRIOR PROVISIONS

Provisions similar to those in this section were contained in section 3251 of this title, prior to the general amendment of the Solid Waste Disposal Act by Pub. L. 94-580.

AMENDMENTS

1984—Subsec. (a). Pub. L. 98-616, §101(b)(1), designated existing provisions as subsec. (a).

Subsec. (a)(4) to (11). Pub. L. 98-616, §101(b)(2), struck out par. (4) which provided for regulating the treatment, storage, transportation, and disposal of hazardous wastes which have adverse effects on health and the environment, added pars. (4) to (7), and redesignated former pars. (5) to (8) as (8) to (11), respectively.

Subsec. (b). Pub. L. 98-616, §101(b)(1), added subsec. (b).

§ 6903. Definitions

As used in this chapter:

(1) The term "Administrator" means the Administrator of the Environmental Protection Agency.

(2) The term "construction, with respect to any project of construction under this chapter, means (A) the erection or building of new structures and acquisition of lands or interests therein, or the acquisition, replacement, expansion, remodeling, alteration, modernization, or extension of existing structures, and (B) the acquisition and installation of initial equipment of, or required in connection with, new or newly acquired structures or the expanded, remodeled, altered, modernized or extended part of existing structures (including trucks and other motor vehicles, and tractors, cranes, and other machinery) necessary for the proper utilization and operation of the facility after completion of the project; and includes preliminary planning to determine the economic and engineering feasibility and the public health and safety aspects of the project, the engineering, architectural, legal, fiscal, and economic investigations and studies, and any surveys, designs, plans, working drawings, specifications, and other action necessary for the carrying out of the project, and (C) the inspection and supervision of the process of carrying out the project to completion.

(2A) The term "demonstration" means the initial exhibition of a new technology process or practice or a significantly new combination or use of technologies, processes or practices, subsequent to the development stage, for the purpose of proving technological feasibility and cost effectiveness.

(3) The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

(4) The term "Federal agency" means any department, agency, or other instrumentality of the Federal Government, any independent agency or establishment of the Federal Government including any Government corporation, and the Government Printing Office.

(5) The term "hazardous waste" means a solid waste, or combination of solid wastes, which be-

cause of its quantity, concentration, or physical, chemical, or infectious characteristics may—

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

(6) The term "hazardous waste generation" means the act or process of producing hazardous waste.

(7) The term "hazardous waste management" means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes.

(8) For purposes of Federal financial assistance (other than rural communities assistance), the term "implementation" does not include the acquisition, leasing, construction, or modification of facilities or equipment or the acquisition, leasing, or improvement of land.

(9) The term "intermunicipal agency" means an agency established by two or more municipalities with responsibility for planning or administration of solid waste.

(10) The term "interstate agency" means an agency of two or more municipalities in different States, or an agency established by two or more States, with authority to provide for the management of solid wastes and serving two or more municipalities located in different States.

(11) The term "long-term contract" means, when used in relation to solid waste supply, a contract of sufficient duration to assure the viability of a resource recovery facility (to the extent that such viability depends upon solid waste supply).

(12) The term "manifest" means the form used for identifying the quantity, composition, and the origin, routing, and destination of hazardous waste during its transportation from the point of generation to the point of disposal, treatment, or storage.

(13) The term "municipality" (A) means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law, with responsibility for the planning or administration of solid waste management, or an Indian tribe or authorized tribal organization or Alaska Native village or organization, and (B) includes any rural community or unincorporated town or village or any other public entity for which an application for assistance is made by a State or political subdivision thereof.

(14) The term "open dump" means any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated under section 6944 of this title and which is not a facility for disposal of hazardous waste.

(15) The term "person" means an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each depart-

ment, agency, and instrumentality of the United States.

(16) The term "procurement item" means any device, good, substance, material, product, or other item whether real or personal property which is the subject of any purchase, barter, or other exchange made to procure such item.

(17) The term "procuring agency" means any Federal agency, or any State agency or agency of a political subdivision of a State which is using appropriated Federal funds for such procurement, or any person contracting with any such agency with respect to work performed under such contract.

(18) The term "recoverable" refers to the capability and likelihood of being recovered from solid waste for a commercial or industrial use.

(19) The term "recovered material" means waste material and byproducts which have been recovered or diverted from solid waste, but such term does not include those materials and byproducts generated from, and commonly reused within, an original manufacturing process.

(20) The term "recovered resources" means material or energy recovered from solid waste.

(21) The term "resource conservation" means reduction of the amounts of solid waste that are generated, reduction of overall resource consumption, and utilization of recovered resources.

(22) The term "resource recovery" means the recovery of material or energy from solid waste.

(23) The term "resource recovery system" means a solid waste management system which provides for collection, separation, recycling, and recovery of solid wastes, including disposal of nonrecoverable waste residues.

(24) The term "resource recovery facility" means any facility at which solid waste is processed for the purpose of extracting, converting to energy, or otherwise separating and preparing solid waste for reuse.

(25) The term "regional authority" means the authority established or designated under section 6946 of this title.

(26) The term "sanitary landfill" means a facility for the disposal of solid waste which meets the criteria published under section 6944 of this title.

(26A) The term "sludge" means any solid, semisolid or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility or any other such waste having similar characteristics and effects.

(27) The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 U.S.C. 2011 et seq.].

(28) The term "solid waste management" means the systematic administration of activities which provide for the collection, source separation, storage, transportation, transfer, processing, treatment, and disposal of solid waste.

(29) The term "solid waste management facility" includes—

(A) any resource recovery system or component thereof,

(B) any system, program, or facility for resource conservation, and

(C) any facility for the collection, source separation, storage, transportation, transfer, processing, treatment or disposal of solid wastes, including hazardous wastes, whether such facility is associated with facilities generating such wastes or otherwise.

(30) The terms "solid waste planning", "solid waste management", and "comprehensive planning" include planning or management respecting resource recovery and resource conservation.

(31) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(32) The term "State authority" means the agency established or designated under section 6947 of this title.

(33) The term "storage", when used in connection with hazardous waste, means the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste.

(34) The term "treatment", when used in connection with hazardous waste, means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

(35) The term "virgin material" means a raw material, including previously unused copper, aluminum, lead, zinc, iron, or other metal or metal ore, any undeveloped resource that is, or with new technology will become, a source of raw materials.

(36) The term "used oil" means any oil which has been—

(A) refined from crude oil,

(B) used, and

(C) as a result of such use, contaminated by physical or chemical impurities.

(37) The term "recycled oil" means any used oil which is reused, following its original use, for any purpose (including the purpose for which the oil was originally used). Such term includes oil which is re-refined, reclaimed, burned, or re-processed.

(38) The term "lubricating oil" means the fraction of crude oil which is sold for purposes of reducing friction in any industrial or mechanical device. Such term includes re-refined oil.

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(39) The term “re-refined oil” means used oil from which the physical and chemical contaminants acquired through previous use have been removed through a refining process.

(40) Except as otherwise provided in this paragraph, the term “medical waste” means any solid waste which is generated in the diagnosis, treatment, or immunization of human beings or animals, in research pertaining thereto, or in the production or testing of biologicals. Such term does not include any hazardous waste identified or listed under subchapter III of this chapter or any household waste as defined in regulations under subchapter III of this chapter.

(41) The term “mixed waste” means waste that contains both hazardous waste and source, special nuclear, or by-product material subject to the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.).

(Pub. L. 89-272, title II, §1004, as added Pub. L. 94-580, §2, Oct. 21, 1976, 90 Stat. 2798; amended Pub. L. 95-609, §7(b), Nov. 8, 1978, 92 Stat. 3081; Pub. L. 96-463, §3, Oct. 15, 1980, 94 Stat. 2055; Pub. L. 96-482, §2, Oct. 21, 1980, 94 Stat. 2334; Pub. L. 100-582, §3, Nov. 1, 1988, 102 Stat. 2958; Pub. L. 102-386, title I, §§103, 105(b), Oct. 6, 1992, 106 Stat. 1507, 1512.)

REFERENCES IN TEXT

The Atomic Energy Act of 1954, referred to in pars. (27) and (41), is act Aug. 1, 1946, ch. 724, as added by act Aug. 30, 1954, ch. 1073, §1, 68 Stat. 921, and amended, which is classified generally to chapter 23 (§2011 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2011 of this title and Tables.

PRIOR PROVISIONS

Provisions similar to those in this section were contained in section 3252 of this title, prior to the general amendment of the Solid Waste Disposal Act by Pub. L. 94-580.

AMENDMENTS

1992—Par. (15). Pub. L. 102-386, §103, inserted before period at end “and shall include each department, agency, and instrumentality of the United States.”

Par. (41). Pub. L. 102-386, §105(b), added par. (41).

1988—Par. (40). Pub. L. 100-582 added par. (40).

1980—Par. (14). Pub. L. 96-482, §2(a), defined “open dump” to include a facility, substituted requirement that disposal facility or site not be a sanitary landfill meeting section 6944 of this title criteria for prior requirement that disposal site not be a sanitary landfill within meaning of section 6944 of this title, and required that the disposal facility or site not be a facility for disposal of hazardous waste.

Par. (19). Pub. L. 96-482, §2(b), defined “recovered material” to cover byproducts, substituted provision for recovery or diversion of waste material and byproducts from solid waste for prior provision for collection or recovery of material from solid waste, and excluded materials and byproducts generated from and commonly reused within an original manufacturing process.

Pars. (36) to (39). Pub. L. 96-463, §3, added pars. (36) to (39).

1978—Par. (8). Pub. L. 95-609, §7(b)(1), struck out provision stating that employees salaries due pursuant to subchapter IV of this chapter would not be included after Dec. 31, 1979.

Par. (10). Pub. L. 95-609, §7(b)(2), substituted “management” for “disposal.”

Par. (29)(C). Pub. L. 95-609, §7(b)(3), substituted “the collection, source separation, storage, transportation, transfer, processing, treatment or disposal for” “the treatment.”

TRANSFER OF FUNCTIONS

Enforcement functions of Administrator or other official of Environmental Protection Agency related to compliance with resource conservation and recovery permits used under this chapter with respect to preconstruction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, eff. July 1, 1979, §§102(a), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102-486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

§ 6904. Governmental cooperation

a) Interstate cooperation

The provisions of this chapter to be carried out by States may be carried out by interstate agencies and provisions applicable to States may apply to interstate regions where such agencies and regions have been established by the respective States and approved by the Administrator. In any such case, action required to be taken by the Governor of a State, respecting regional designation shall be required to be taken by the Governor of each of the respective States with respect to so much of the interstate region as is within the jurisdiction of that State.

b) Consent of Congress to compacts

The consent of the Congress is hereby given to two or more States to negotiate and enter into agreements or compacts, not in conflict with any law or treaty of the United States, for—

(1) cooperative effort and mutual assistance for the management of solid waste or hazardous waste (or both) and the enforcement of their respective laws relating thereto, and

(2) the establishment of such agencies, joint or otherwise, as they may deem desirable for making effective such agreements or compacts.

No such agreement or compact shall be binding or obligatory upon any State a party thereto unless it is agreed upon by all parties to the agreement and until it has been approved by the Administrator and the Congress.

(Pub. L. 89-272, title II, §1005, as added Pub. L. 94-580, §2, Oct. 21, 1976, 90 Stat. 2801.)

TRANSFER OF FUNCTIONS

For transfer of certain enforcement functions of Administrator or other official of Environmental Protection Agency under this chapter to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, and subsequent transfer to Secretary of Energy, then to Federal Coordinator for Alaska Natural Gas Transportation Projects, see note set out under section 6903 of this title.

Office of Federal Inspector for the Alaska Natural Gas Transportation System, and subsequent transfer to Secretary of Energy, then to Federal Coordinator for Alaska Natural Gas Transportation Projects, see note set out under section 6903 of this title.

§ 6975. Separability

If any provision of this chapter, or the application of any provision of this chapter to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this chapter, shall not be affected thereby.

(Pub. L. 89-272, title II, § 7005, as added Pub. L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2827.)

§ 6976. Judicial review

a) Review of final regulations and certain petitions

Any judicial review of final regulations promulgated pursuant to this chapter and the Administrator's denial of any petition for the promulgation, amendment, or repeal of any regulation under this chapter shall be in accordance with sections 701 through 706 of title 5, except that—

(1) a petition for review of action of the Administrator in promulgating any regulation, or requirement under this chapter or denying any petition for the promulgation, amendment or repeal of any regulation under this chapter may be filed only in the United States Court of Appeals for the District of Columbia, and such petition shall be filed within ninety days from the date of such promulgation or denial, or after such date if such petition for review is based solely on grounds arising after such ninetieth day; action of the Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in civil or criminal proceedings for enforcement; and

(2) in any judicial proceeding brought under this section in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if a party seeking review under this chapter applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that the information is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, and to be adduced upon the hearing in such manner and upon such terms and conditions as the court may deem proper; the Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file with the court such modified or new findings and his recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

b) Review of certain actions under sections 6925 and 6926 of this title

Review of the Administrator's action (1) in issuing, denying, modifying, or revoking any per-

mit under section 6925 of this title (or in modifying or revoking any permit which is deemed to have been issued under section 6935(d)(1)¹ of this title), or (2) in granting, denying, or withdrawing authorization or interim authorization under section 6926 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such issuance, denial, modification, revocation, grant, or withdrawal, or after such date only if such application is based solely on grounds which arose after such ninetieth day. Action of the Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in civil or criminal proceedings for enforcement. Such review shall be in accordance with sections 701 through 706 of title 5.

(Pub. L. 89-272, title II, § 7006, as added Pub. L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2827; amended Pub. L. 96-482, § 27, Oct. 21, 1980, 94 Stat. 2349; Pub. L. 98-616, title II, § 241(b)(1), title IV, § 403(d)(5), Nov. 8, 1984, 98 Stat. 3259, 3273.)

REFERENCES IN TEXT

Section 6935(d)(1) of this title, referred to in subsec. (b), was in the original a reference to section 3012(d)(1) of Pub. L. 89-272, which was renumbered section 3014(d)(1) of Pub. L. 89-272 by Pub. L. 98-616 and is classified to section 6935(d)(1) of this title.

AMENDMENTS

1984—Pub. L. 98-616 inserted "(or in modifying or revoking any permit which is deemed to have been issued under section 6935(d)(1) of this title) and inserted "Action of the Administrator with respect to which review could have been obtained under this subsection shall not be subject to judicial review in civil or criminal proceedings for enforcement.

1980—Pub. L. 96-482, § 27(a), designated existing provisions as subsec. (a), in provision preceding par. (1), included judicial review of Administrator's denial of any petition for promulgation, amendment, or repeal of any regulation in par. (1), included review of Administrator's denial of any petition for promulgation, amendment, or repeal of any regulation, and substituted "District of Columbia, and for "District of Columbia. Any , "date of such promulgation or denial for "date of such promulgation , "petition for review is based for "petition is based , and " ; action for " . Action , and in par. (2), substituted "proper; the for "proper. The , and added subsec. (b).

TRANSFER OF FUNCTIONS

For transfer of certain enforcement functions of Administrator or other official of Environmental Protection Agency under this chapter to Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, and subsequent transfer to Secretary of Energy, then to Federal Coordinator for Alaska Natural Gas Transportation Projects, see note set out under section 6903 of this title.

§ 6977. Grants or contracts for training projects

a) General authority

The Administrator is authorized to make grants to, and contracts with any eligible orga-

¹ See References in Text note below.

(i) Any mixture of a solid waste and an eligible radioactive mixed waste; and

(ii) Any solid waste generated from treating, storing, or disposing of an eligible radioactive mixed waste.

(3) Waste exempted under this section must meet the eligibility criteria and specified conditions in 40 CFR 266.225 and 40 CFR 266.230 (for storage and treatment) and in 40 CFR 266.310 and 40 CFR 266.315 (for transportation and disposal). Waste that fails to satisfy these eligibility criteria and conditions is regulated as hazardous waste.

[57 FR 7632, Mar. 3, 1992; 57 FR 23063, June 1, 1992, as amended at 57 FR 37263, Aug. 18, 1992; 57 FR 41611, Sept. 10, 1992; 57 FR 49279, Oct. 30, 1992; 59 FR 38545, July 28, 1994; 60 FR 7848, Feb. 9, 1995; 63 FR 28637, May 26, 1998; 63 FR 42184, Aug. 6, 1998; 66 FR 27297, May 16, 2001; 66 FR 50333, Oct. 3, 2001; 70 FR 34561, June 14, 2005; 70 FR 57784, Oct. 4, 2005; 71 FR 40258, July 14, 2006]

§ 261.4 Exclusions.

(a) *Materials which are not solid wastes.* The following materials are not solid wastes for the purpose of this part:

(1)(i) Domestic sewage; and

(ii) Any mixture of domestic sewage and other wastes that passes through a sewer system to a publicly-owned treatment works for treatment. "Domestic sewage" means untreated sanitary wastes that pass through a sewer system.

(2) Industrial wastewater discharges that are point source discharges subject to regulation under section 402 of the Clean Water Act, as amended.

[*Comment:* This exclusion applies only to the actual point source discharge. It does not exclude industrial wastewaters while they are being collected, stored or treated before discharge, nor does it exclude sludges that are generated by industrial wastewater treatment.]

(3) Irrigation return flows.

(4) Source, special nuclear or by-product material as defined by the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 *et seq.*

(5) Materials subjected to in-situ mining techniques which are not removed from the ground as part of the extraction process.

(6) Pulping liquors (*i.e.*, black liquor) that are reclaimed in a pulping liquor recovery furnace and then reused in the pulping process, unless it is accumulated speculatively as defined in § 261.1(c) of this chapter.

(7) Spent sulfuric acid used to produce virgin sulfuric acid, unless it is accumulated speculatively as defined in § 261.1(c) of this chapter.

(8) Secondary materials that are reclaimed and returned to the original process or processes in which they were generated where they are reused in the production process provided:

(i) Only tank storage is involved, and the entire process through completion of reclamation is closed by being entirely connected with pipes or other comparable enclosed means of conveyance;

(ii) Reclamation does not involve controlled flame combustion (such as occurs in boilers, industrial furnaces, or incinerators);

(iii) The secondary materials are never accumulated in such tanks for over twelve months without being reclaimed; and

(iv) The reclaimed material is not used to produce a fuel, or used to produce products that are used in a manner constituting disposal.

(9)(i) Spent wood preserving solutions that have been reclaimed and are reused for their original intended purpose; and

(ii) Wastewaters from the wood preserving process that have been reclaimed and are reused to treat wood.

(iii) Prior to reuse, the wood preserving wastewaters and spent wood preserving solutions described in paragraphs (a)(9)(i) and (a)(9)(ii) of this section, so long as they meet all of the following conditions:

(A) The wood preserving wastewaters and spent wood preserving solutions are reused on-site at water borne plants in the production process for their original intended purpose;

(B) Prior to reuse, the wastewaters and spent wood preserving solutions are managed to prevent release to either land or groundwater or both;

(C) Any unit used to manage wastewaters and/or spent wood preserving solutions prior to reuse can be

visually or otherwise determined to prevent such releases;

(D) Any drip pad used to manage the wastewaters and/or spent wood preserving solutions prior to reuse complies with the standards in part 265, subpart W of this chapter, regardless of whether the plant generates a total of less than 100 kg/month of hazardous waste; and

(E) Prior to operating pursuant to this exclusion, the plant owner or operator prepares a one-time notification stating that the plant intends to claim the exclusion, giving the date on which the plant intends to begin operating under the exclusion, and containing the following language: "I have read the applicable regulation establishing an exclusion for wood preserving wastewaters and spent wood preserving solutions and understand it requires me to comply at all times with the conditions set out in the regulation." The plant must maintain a copy of that document in its on-site records until closure of the facility. The exclusion applies so long as the plant meets all of the conditions. If the plant goes out of compliance with any condition, it may apply to the appropriate Regional Administrator or state Director for reinstatement. The Regional Administrator or state Director may reinstate the exclusion upon finding that the plant has returned to compliance with all conditions and that the violations are not likely to recur.

(10) EPA Hazardous Waste Nos. K060, K087, K141, K142, K143, K144, K145, K147, and K148, and any wastes from the coke by-products processes that are hazardous only because they exhibit the Toxicity Characteristic (TC) specified in section 261.24 of this part when, subsequent to generation, these materials are recycled to coke ovens, to the tar recovery process as a feedstock to produce coal tar, or mixed with coal tar prior to the tar's sale or refining. This exclusion is conditioned on there being no land disposal of the wastes from the point they are generated to the point they are recycled to coke ovens or tar recovery or refining processes, or mixed with coal tar.

(11) Nonwastewater splash condenser dross residue from the treatment of K061 in high temperature metals recovery

units, provided it is shipped in drums (if shipped) and not land disposed before recovery.

(12)(i) Oil-bearing hazardous secondary materials (*i.e.*, sludges, byproducts, or spent materials) that are generated at a petroleum refinery (SIC code 2911) and are inserted into the petroleum refining process (SIC code 2911—including, but not limited to, distillation, catalytic cracking, fractionation, or thermal cracking units (*i.e.*, cokers)) unless the material is placed on the land, or speculatively accumulated before being so recycled. Materials inserted into thermal cracking units are excluded under this paragraph, provided that the coke product also does not exhibit a characteristic of hazardous waste. Oil-bearing hazardous secondary materials may be inserted into the same petroleum refinery where they are generated, or sent directly to another petroleum refinery and still be excluded under this provision. Except as provided in paragraph (a)(12)(ii) of this section, oil-bearing hazardous secondary materials generated elsewhere in the petroleum industry (*i.e.*, from sources other than petroleum refineries) are not excluded under this section. Residuals generated from processing or recycling materials excluded under this paragraph (a)(12)(i), where such materials as generated would have otherwise met a listing under subpart D of this part, are designated as F037 listed wastes when disposed of or intended for disposal.

(ii) Recovered oil that is recycled in the same manner and with the same conditions as described in paragraph (a)(12)(i) of this section. Recovered oil is oil that has been reclaimed from secondary materials (including wastewater) generated from normal petroleum industry practices, including refining, exploration and production, bulk storage, and transportation incident thereto (SIC codes 1311, 1321, 1381, 1382, 1389, 2911, 4612, 4613, 4922, 4923, 4789, 5171, and 5172.) Recovered oil does not include oil-bearing hazardous wastes listed in subpart D of this part; however, oil recovered from such wastes may be considered recovered oil. Recovered oil does not include used oil as defined in 40 CFR 279.1.

(13) Excluded scrap metal (processed scrap metal, unprocessed home scrap metal, and unprocessed prompt scrap metal) being recycled.

(14) Shredded circuit boards being recycled provided that they are:

(i) Stored in containers sufficient to prevent a release to the environment prior to recovery; and

(ii) Free of mercury switches, mercury relays and nickel-cadmium batteries and lithium batteries.

(15) Condensates derived from the overhead gases from kraft mill steam strippers that are used to comply with 40 CFR 63.446(e). The exemption applies only to combustion at the mill generating the condensates.

(16) [Reserved]

(17) Spent materials (as defined in § 261.1) (other than hazardous wastes listed in subpart D of this part) generated within the primary mineral processing industry from which minerals, acids, cyanide, water, or other values are recovered by mineral processing or by beneficiation, provided that:

(i) The spent material is legitimately recycled to recover minerals, acids, cyanide, water or other values;

(ii) The spent material is not accumulated speculatively;

(iii) Except as provided in paragraph (a)(17)(iv) of this section, the spent material is stored in tanks, containers, or buildings meeting the following minimum integrity standards: a building must be an engineered structure with a floor, walls, and a roof all of which are made of non-earthen materials providing structural support (except smelter buildings may have partially earthen floors provided the secondary material is stored on the non-earthen portion), and have a roof suitable for diverting rainwater away from the foundation; a tank must be free standing, not be a surface impoundment (as defined in 40 CFR 260.10), and be manufactured of a material suitable for containment of its contents; a container must be free standing and be manufactured of a material suitable for containment of its contents. If tanks or containers contain any particulate which may be subject to wind dispersal, the owner/operator must operate these units in a manner which con-

trols fugitive dust. Tanks, containers, and buildings must be designed, constructed and operated to prevent significant releases to the environment of these materials.

(iv) The Regional Administrator or State Director may make a site-specific determination, after public review and comment, that only solid mineral processing spent material may be placed on pads rather than tanks containers, or buildings. Solid mineral processing spent materials do not contain any free liquid. The decision-maker must affirm that pads are designed, constructed and operated to prevent significant releases of the secondary material into the environment. Pads must provide the same degree of containment afforded by the non-RCRA tanks, containers and buildings eligible for exclusion.

(A) The decision-maker must also consider if storage on pads poses the potential for significant releases via groundwater, surface water, and air exposure pathways. Factors to be considered for assessing the groundwater, surface water, air exposure pathways are: The volume and physical and chemical properties of the secondary material, including its potential for migration off the pad; the potential for human or environmental exposure to hazardous constituents migrating from the pad via each exposure pathway, and the possibility and extent of harm to human and environmental receptors via each exposure pathway.

(B) Pads must meet the following minimum standards: Be designed of non-earthen material that is compatible with the chemical nature of the mineral processing spent material, capable of withstanding physical stresses associated with placement and removal, have run on/runoff controls, be operated in a manner which controls fugitive dust, and have integrity assurance through inspections and maintenance programs.

(C) Before making a determination under this paragraph, the Regional Administrator or State Director must provide notice and the opportunity for comment to all persons potentially interested in the determination. This can be accomplished by placing notice of this action in major local newspapers,

characteristics of hazardous waste identified in subpart C.

(i) If any person mixes a solid waste with a hazardous waste that exceeds a quantity exclusion level of this section, the mixture is subject to full regulation.

(j) If a conditionally exempt small quantity generator's wastes are mixed with used oil, the mixture is subject to part 279 of this chapter. Any material produced from such a mixture by processing, blending, or other treatment is also so regulated.

[51 FR 10174, Mar. 24, 1986, as amended at 51 FR 28682, Aug. 8, 1986; 51 FR 40637, Nov. 7, 1986; 53 FR 27163, July 19, 1988; 58 FR 26424, May 3, 1993; 60 FR 25541, May 11, 1995; 61 FR 34278, July 1, 1996; 63 FR 24968, May 6, 1998; 63 FR 37782, July 14, 1998; 68 FR 44665, July 30, 2003; 73 FR 72954, Dec. 1, 2008; 75 FR 13001, Mar. 18, 2010]

§ 261.6 Requirements for recyclable materials.

(a)(1) Hazardous wastes that are recycled are subject to the requirements for generators, transporters, and storage facilities of paragraphs (b) and (c) of this section, except for the materials listed in paragraphs (a)(2) and (a)(3) of this section. Hazardous wastes that are recycled will be known as "recyclable materials."

(2) The following recyclable materials are not subject to the requirements of this section but are regulated under subparts C through N of part 266 of this chapter and all applicable provisions in parts 268, 270, and 124 of this chapter.

(i) Recyclable materials used in a manner constituting disposal (40 CFR part 266, subpart C);

(ii) Hazardous wastes burned (as defined in section 266.100(a)) in boilers and industrial furnaces that are not regulated under subpart O of part 264 or 265 of this chapter (40 CFR part 266, subpart H);

(iii) Recyclable materials from which precious metals are reclaimed (40 CFR part 266, subpart F);

(iv) Spent lead-acid batteries that are being reclaimed (40 CFR part 266, subpart G).

(3) The following recyclable materials are not subject to regulation under parts 262 through parts 268, 270 or 124 of this chapter, and are not subject

to the notification requirements of section 3010 of RCRA:

(i) Industrial ethyl alcohol that is reclaimed except that, unless provided otherwise in an international agreement as specified in § 262.58:

(A) A person initiating a shipment for reclamation in a foreign country, and any intermediary arranging for the shipment, must comply with the requirements applicable to a primary exporter in §§ 262.53, 262.56 (a)(1)-(4), (6), and (b), and 262.57, export such materials only upon consent of the receiving country and in conformance with the EPA Acknowledgment of Consent as defined in subpart E of part 262, and provide a copy of the EPA Acknowledgment of Consent to the shipment to the transporter transporting the shipment for export;

(B) Transporters transporting a shipment for export may not accept a shipment if he knows the shipment does not conform to the EPA Acknowledgment of Consent, must ensure that a copy of the EPA Acknowledgment of Consent accompanies the shipment and must ensure that it is delivered to the facility designated by the person initiating the shipment.

(ii) Scrap metal that is not excluded under § 261.4(a)(13);

(iii) Fuels produced from the refining of oil-bearing hazardous waste along with normal process streams at a petroleum refining facility if such wastes result from normal petroleum refining, production, and transportation practices (this exemption does not apply to fuels produced from oil recovered from oil-bearing hazardous waste, where such recovered oil is already excluded under § 261.4(a)(12);

(iv)(A) Hazardous waste fuel produced from oil-bearing hazardous wastes from petroleum refining, production, or transportation practices, or produced from oil reclaimed from such hazardous wastes, where such hazardous wastes are reintroduced into a process that does not use distillation or does not produce products from crude oil so long as the resulting fuel meets the used oil specification under § 279.11 of this chapter and so long as no other hazardous wastes are used to produce the hazardous waste fuel;

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(B) Hazardous waste fuel produced from oil-bearing hazardous waste from petroleum refining production, and transportation practices, where such hazardous wastes are reintroduced into a refining process after a point at which contaminants are removed, so long as the fuel meets the used oil fuel specification under §279.11 of this chapter; and

(C) Oil reclaimed from oil-bearing hazardous wastes from petroleum refining, production, and transportation practices, which reclaimed oil is burned as a fuel without reintroduction to a refining process, so long as the reclaimed oil meets the used oil fuel specification under §279.11 of this chapter.

(4) Used oil that is recycled and is also a hazardous waste solely because it exhibits a hazardous characteristic is not subject to the requirements of parts 260 through 268 of this chapter, but is regulated under part 279 of this chapter. Used oil that is recycled includes any used oil which is reused, following its original use, for any purpose (including the purpose for which the oil was originally used). Such term includes, but is not limited to, oil which is re-refined, reclaimed, burned for energy recovery, or reprocessed.

(5) Hazardous waste that is exported to or imported from designated member countries of the Organization for Economic Cooperation and Development (OECD) (as defined in §262.58(a)(1)) for purpose of recovery is subject to the requirements of 40 CFR part 262, subpart H, if it is subject to either the Federal manifesting requirements of 40 CFR Part 262, to the universal waste management standards of 40 CFR Part 273, or to State requirements analogous to 40 CFR Part 273.

(b) Generators and transporters of recyclable materials are subject to the applicable requirements of parts 262 and 263 of this chapter and the notification requirements under section 3010 of RCRA, except as provided in paragraph (a) of this section.

(c) (1) Owners and operators of facilities that store recyclable materials before they are recycled are regulated under all applicable provisions of subparts A through L, AA, BB, and CC of parts 264 and 265, and under parts 124,

266, 267, 268, and 270 of this chapter and the notification requirements under section 3010 of RCRA, except as provided in paragraph (a) of this section. (The recycling process itself is exempt from regulation except as provided in §261.6(d).)

(2) Owners or operators of facilities that recycle recyclable materials without storing them before they are recycled are subject to the following requirements, except as provided in paragraph (a) of this section:

(i) Notification requirements under section 3010 of RCRA;

(ii) Sections 265.71 and 265.72 (dealing with the use of the manifest and manifest discrepancies) of this chapter.

(iii) Section 261.6(d) of this chapter.

(d) Owners or operators of facilities subject to RCRA permitting requirements with hazardous waste management units that recycle hazardous wastes are subject to the requirements of subparts AA and BB of part 264, 265 or 267 of this chapter.

[50 FR 49203, Nov. 29, 1985]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §261.6, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

§261.7 Residues of hazardous waste in empty containers.

(a)(1) Any hazardous waste remaining in either: an empty container; or an inner liner removed from an empty container, as defined in paragraph (b) of this section, is not subject to regulation under parts 261 through 268, 270, or 124 this chapter or to the notification requirements of section 3010 of RCRA.

(2) Any hazardous waste in either a container that is not empty or an inner liner removed from a container that is not empty, as defined in paragraph (b) of this section, is subject to regulation under parts 261 through 268, 270 and 124 of this chapter and to the notification requirements of section 3010 of RCRA.

(b)(1) A container or an inner liner removed from a container that has held any hazardous waste, except a waste that is a compressed gas or that is identified as an acute hazardous waste listed in §§261.31 or 261.33(e) of this chapter is empty if:

(i) All wastes have been removed that can be removed using the practices commonly employed to remove materials from that type of container, e.g., pouring, pumping, and aspirating, and

(ii) No more than 2.5 centimeters (one inch) of residue remain on the bottom of the container or inner liner, or

(iii)(A) No more than 3 percent by weight of the total capacity of the container remains in the container or inner liner if the container is less than or equal to 119 gallons in size; or

(B) No more than 0.3 percent by weight of the total capacity of the container remains in the container or inner liner if the container is greater than 119 gallons in size.

(2) A container that has held a hazardous waste that is a compressed gas is empty when the pressure in the container approaches atmospheric.

(3) A container or an inner liner removed from a container that has held an acute hazardous waste listed in §§ 261.31 or 261.33(e) is empty if:

(i) The container or inner liner has been triple rinsed using a solvent capable of removing the commercial chemical product or manufacturing chemical intermediate;

(ii) The container or inner liner has been cleaned by another method that has been shown in the scientific literature, or by tests conducted by the generator, to achieve equivalent removal; or

(iii) In the case of a container, the inner liner that prevented contact of the commercial chemical product or manufacturing chemical intermediate with the container, has been removed.

[45 FR 78529, Nov. 25, 1980, as amended at 47 FR 36097, Aug. 18, 1982; 48 FR 14294, Apr. 1, 1983; 50 FR 1999, Jan. 14, 1985; 51 FR 40637, Nov. 7, 1986; 70 FR 10815, Mar. 4, 2005; 70 FR 53453, Sept. 8, 2005; 75 FR 13002, Mar. 18, 2010]

§ 261.8 PCB wastes regulated under Toxic Substance Control Act.

The disposal of PCB-containing dielectric fluid and electric equipment containing such fluid authorized for use and regulated under part 761 of this chapter and that are hazardous only because they fail the test for the Toxicity Characteristic (Hazardous Waste Codes D018 through D043 only) are exempt from regulation under parts 261

through 265, and parts 268, 270, and 124 of this chapter, and the notification requirements of section 3010 of RCRA.

[55 FR 11862, Mar. 29, 1990]

§ 261.9 Requirements for Universal Waste.

The wastes listed in this section are exempt from regulation under parts 262 through 270 of this chapter except as specified in part 273 of this chapter and, therefore are not fully regulated as hazardous waste. The wastes listed in this section are subject to regulation under 40 CFR part 273:

(a) Batteries as described in 40 CFR 273.2;

(b) Pesticides as described in § 273.3 of this chapter;

(c) Mercury-containing equipment as described in § 273.4 of this chapter; and

(d) Lamps as described in § 273.5 of this chapter.

[60 FR 25541, May 11, 1995, as amended at 64 FR 36487, July 6, 1999; 70 FR 45520, Aug. 5, 2005]

Subpart B—Criteria for Identifying the Characteristics of Hazardous Waste and for Listing Hazardous Waste

§ 261.10 Criteria for identifying the characteristics of hazardous waste.

(a) The Administrator shall identify and define a characteristic of hazardous waste in subpart C only upon determining that:

(1) A solid waste that exhibits the characteristic may:

(i) Cause, or significantly contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(ii) Pose a substantial present or potential hazard to human health or the environment when it is improperly treated, stored, transported, disposed of or otherwise managed; and

(2) The characteristic can be:

(i) Measured by an available standardized test method which is reasonably within the capability of generators of solid waste or private sector laboratories that are available to serve generators of solid waste; or

in paragraph (b) of this section and remain subject to regulation.

(d) Fertilizers that contain recyclable materials are not subject to regulation provided that:

(1) They are zinc fertilizers excluded from the definition of solid waste according to §261.4(a)(21) of this chapter; or

(2) They meet the applicable treatment standards in subpart D of Part 268 of this chapter for each hazardous waste that they contain.

[50 FR 666, Jan. 4, 1985, as amended at 52 FR 21307, June 5, 1987; 54 FR 36970, Sept. 6, 1989; 59 FR 43500, Aug. 24, 1994; 67 FR 48414, July 24, 2002; 77 FR 22232, Apr. 13, 2012]

§ 266.21 Standards applicable to generators and transporters of materials used in a manner that constitutes disposal.

Generators and transporters of materials that are used in a manner that constitutes disposal are subject to the applicable requirements of parts 262 and 263 of this chapter, and the notification requirement under section 3010 of RCRA.

§ 266.22 Standards applicable to storers of materials that are to be used in a manner that constitutes disposal who are not the ultimate users.

Owners or operators of facilities that store recyclable materials that are to be used in a manner that constitutes disposal, but who are not the ultimate users of the materials, are regulated under all applicable provisions of subparts A through L of parts 264, 265 and 267, and parts 270 and 124 of this chapter and the notification requirement under section 3010 of RCRA.

[75 FR 13006, Mar. 18, 2010]

§ 266.23 Standards applicable to users of materials that are used in a manner that constitutes disposal.

(a) Owners or operators of facilities that use recyclable materials in a manner that constitutes disposal are regulated under all applicable provisions of subparts A through N of parts 124, 264, 265, 268, and 270 of this chapter and the notification requirement under section 3010 of RCRA. (These requirements do not apply to products which contain

these recyclable materials under the provisions of §266.20(b) of this chapter.)

(b) The use of waste or used oil or other material, which is contaminated with dioxin or any other hazardous waste (other than a waste identified solely on the basis of ignitability), for dust suppression or road treatment is prohibited.

[50 FR 666, Jan. 4, 1985, as amended at 50 FR 28750, July 15, 1985; 59 FR 48042, Sept. 19, 1994]

Subparts D-E [Reserved]

Subpart F—Recyclable Materials Utilized for Precious Metal Recovery

§ 266.70 Applicability and requirements.

(a) The regulations of this subpart apply to recyclable materials that are reclaimed to recover economically significant amounts of gold, silver, platinum, palladium, iridium, osmium, rhodium, ruthenium, or any combination of these.

(b) Persons who generate, transport, or store recyclable materials that are regulated under this subpart are subject to the following requirements:

(1) Notification requirements under section 3010 of RCRA;

(2) Subpart B of part 262 (for generators), §§ 263.20 and 263.21 (for transporters), and §§ 265.71 and 265.72 (for persons who store) of this chapter; and

(3) For precious metals exported to or imported from designated OECD member countries for recovery, subpart H of part 262 and §265.12(a)(2) of this chapter. For precious metals exported to or imported from non-OECD countries for recovery, subparts E and F of 40 CFR part 262.

(c) Persons who store recycled materials that are regulated under this subpart must keep the following records to document that they are not accumulating these materials speculatively (as defined in §261.1(c) of this chapter):

(1) Records showing the volume of these materials stored at the beginning of the calendar year;

(2) The amount of these materials generated or received during the calendar year; and

(3) The amount of materials remaining at the end of the calendar year.

(d) Recyclable materials that are regulated under this subpart that are accumulated speculatively (as defined in §261.1(c) of this chapter) are subject to all applicable provisions of parts 262 through 265, 267, 270, and 124 of this chapter.

[50 FR 666, Jan. 4, 1985, as amended at 61 FR 16315, Apr. 12, 1996; 71 FR 40277, July 14, 2006; 75 FR 13007, Mar. 18, 2010]

Subpart G—Spent Lead-Acid Batteries Being Reclaimed

§266.80 Applicability and requirements.

(a) Are spent lead-acid batteries exempt from hazardous waste management requirements? If you generate, collect, transport, store, or regenerate lead-acid batteries for reclamation purposes, you may be exempt from certain hazardous waste management requirements. Use the following table to determine which requirements apply to you. Alternatively, you may choose to manage your spent lead-acid batteries under the "Universal Waste" rule in 40 CFR part 273.

If your batteries . . .	And if you . . .	Then you . . .	And you . . .
(1) Will be reclaimed through regeneration (such as by electrolyte replacement).	are exempt from 40 CFR parts 262 (except for §262.11), 263, 264, 265, 266, 268, 270, 124 of this chapter, and the notification requirements at section 3010 of RCRA.	are subject to 40 CFR parts 261 and §262.11 of this chapter.
(2) Will be reclaimed other than through regeneration.	generate, collect, and/or transport these batteries.	are exempt from 40 CFR parts 262 (except for §262.11), 263, 264, 265, 266, 270, 124 of this chapter, and the notification requirements at section 3010 of RCRA.	are subject to 40 CFR parts 261 and §262.11, and applicable provisions under part 268.
(3) Will be reclaimed other than through regeneration.	store these batteries but you aren't the reclaimer.	are exempt from 40 CFR parts 262 (except for §262.11), 263, 264, 265, 266, 270, 124 of this chapter, and the notification requirements at section 3010 of RCRA.	are subject to 40 CFR parts 261, §262.11, and applicable provisions under part 268.
(4) Will be reclaimed other than through regeneration.	store these batteries before you reclaim them.	must comply with 40 CFR 266.80(b) and as appropriate other regulatory provisions described in 266.80(b).	are subject to 40 CFR parts 261, §262.11, and applicable provisions under part 268.
(5) Will be reclaimed other than through regeneration.	don't store these batteries before you reclaim them.	are exempt from 40 CFR parts 262 (except for §262.11), 263, 264, 265, 266, 270, 124 of this chapter, and the notification requirements at section 3010 of RCRA.	are subject to 40 CFR parts 261, §262.11, and applicable provisions under part 268.

If your batteries . . .	And if you . . .	Then you . . .	And you . . .
(6) Will be reclaimed through regeneration or any other means.	export these batteries for reclamation in a foreign country.	are exempt from 40 CFR parts 263, 264, 265, 266, 268, 270, 124 of this chapter, and the notification requirements at section 3010 of RCRA. You are also exempt from part 262, except for 262.11, and except for the applicable requirements in either: (1) 40 CFR part 262 subpart H; or (2) 262.53 "Notification of Intent to Export, 262.56(a)(1) through (4)(6) and (b) "Annual Reports," and 262.57 "Recordkeeping".	are subject to 40 CFR part 261 and §262.11, and either must comply with 40 CFR part 262, subpart H (if shipping to one of the OECD countries specified in 40 CFR 262.58(a)(1)), or must: (a) Comply with the requirements applicable to a primary exporter in 40 CFR 262.53, 262.56(a) (1) through (4), (6), and (b) and 262.57; and (b) Export these batteries only upon consent of the receiving country and in conformance with the EPA Acknowledgment of Consent as defined in subpart E of part 262 of this chapter; and (c) Provide a copy of the EPA Acknowledgment of Consent for the shipment to the transporter transporting the shipment for export.
(7) Will be reclaimed through regeneration or any other means.	Transport these batteries in the U.S. to export them for reclamation in a foreign country.	are exempt from 40 CFR parts 263, 264, 265, 266, 268, 270, 124 of this chapter, and the notification requirements at section 3010 of RCRA.	must comply with applicable requirements in 40 CFR part 262, subpart H (if shipping to one of the OECD countries specified in 40 CFR 262.58(a)(1)), or must comply with the following: (a) you may not accept a shipment if you know the shipment does not conform to the EPA Acknowledgment of Consent; (b) you must ensure that a copy of the EPA Acknowledgment of Consent accompanies the shipment; and (c) you must ensure that the shipment is delivered to the facility designated by the person initiating the shipment.

(b) If I store spent lead-acid batteries before I reclaim them but not through regeneration, which requirements apply? The requirements of paragraph (b) of this section apply to you if you store spent lead-acid batteries before you reclaim them, but you don't reclaim them through regeneration. The requirements are slightly different depending on your RCRA permit status.

(1) For Interim Status Facilities, you must comply with:

(i) Notification requirements under section 3010 of RCRA.

(ii) All applicable provisions in subpart A of part 265 of this chapter.

(iii) All applicable provisions in subpart B of part 265 of this chapter except §265.13 (waste analysis).

(iv) All applicable provisions in subparts C and D of part 265 of this chapter.

(v) All applicable provisions in subpart E of part 265 of this chapter except §§265.71 and 265.72 (dealing with the use of the manifest and manifest discrepancies).

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(vi) All applicable provisions in subparts F through L of part 265 of this chapter.

(vii) All applicable provisions in parts 270 and 124 of this chapter.

(viii) All applicable provisions in part 267 of this chapter.

(2) For Permitted Facilities:

(i) Notification requirements under section 3010 of RCRA.

(ii) All applicable provisions in subpart A of part 264 of this chapter.

(iii) All applicable provisions in subpart B of part 264 of this chapter (but not § 264.13 (waste analysis)).

(iv) All applicable provisions in subparts C and D of part 264 of this chapter.

(v) All applicable provisions in subpart E of part 264 of this chapter (but not § 264.71 or § 264.72 (dealing with the use of the manifest and manifest discrepancies)).

(vi) All applicable provisions in subparts F through L of part 264 of this chapter.

(vii) All applicable provisions in parts 270 and 124 of this chapter.

(viii) All applicable provisions in part 267 of this chapter.

[63 FR 71229, Dec. 24, 1998, as amended at 71 FR 40277, July 14, 2006; 75 FR 13007, Mar. 18, 2010; 75 FR 1261, Jan. 8, 2010]

Subpart H—Hazardous Waste Burned in Boilers and Industrial Furnaces

SOURCE: 56 FR 7208, Feb. 21, 1991, unless otherwise noted.

§ 266.100 Applicability.

(a) The regulations of this subpart apply to hazardous waste burned or processed in a boiler or industrial furnace (as defined in § 260.10 of this chapter) irrespective of the purpose of burning or processing, except as provided by paragraphs (b), (c), (d), (g), and (h) of this section. In this subpart, the term "burn" means burning for energy recovery or destruction, or processing for materials recovery or as an ingredient. The emissions standards of §§ 266.104, 266.105, 266.106, and 266.107 apply to facilities operating under interim status or under a RCRA permit as specified in §§ 266.102 and 266.103.

(b) *Integration of the MACT standards.*

(1) Except as provided by paragraphs (b)(2), (b)(3), and (b)(4) of this section, the standards of this part do not apply to a new hazardous waste boiler or industrial furnace unit that becomes subject to RCRA permit requirements after October 12, 2005; or no longer apply when an owner or operator of an existing hazardous waste boiler or industrial furnace unit demonstrates compliance with the maximum achievable control technology (MACT) requirements of part 63, subpart EEE, of this chapter by conducting a comprehensive performance test and submitting to the Administrator a Notification of Compliance under §§ 63.1207(j) and 63.1210(d) of this chapter documenting compliance with the requirements of part 63, subpart EEE, of this chapter. Nevertheless, even after this demonstration of compliance with the MACT standards, RCRA permit conditions that were based on the standards of this part will continue to be in effect until they are removed from the permit or the permit is terminated or revoked, unless the permit expressly provides otherwise.

(2) The following standards continue to apply:

(i) If you elect to comply with § 270.235(a)(1)(i) of this chapter to minimize emissions of toxic compounds from startup, shutdown, and malfunction events, § 266.102(e)(1) requiring operations in accordance with the operating requirements specified in the permit at all times that hazardous waste is in the unit, and § 266.102(e)(2)(iii) requiring compliance with the emission standards and operating requirements during startup and shutdown if hazardous waste is in the combustion chamber, except for particular hazardous wastes. These provisions apply only during startup, shutdown, and malfunction events;

(ii) The closure requirements of §§ 266.102(e)(11) and 266.103(1);

(iii) The standards for direct transfer of § 266.111;

(iv) The standards for regulation of residues of § 266.112; and

(v) The applicable requirements of subparts A through H, BB and CC of parts 264 and 265 of this chapter.

(b) This part provides an alternative set of management standards in lieu of regulation under 40 CFR parts 260 through 272.

[60 FR 25542, May 11, 1995, as amended at 64 FR 36488, July 6, 1999; 70 FR 45520, Aug. 5, 2005]

§273.2 Applicability—batteries.

(a) *Batteries covered under 40 CFR part 273.* (1) The requirements of this part apply to persons managing batteries, as described in §273.9, except those listed in paragraph (b) of this section.

(2) Spent lead-acid batteries which are not managed under 40 CFR part 266, subpart G, are subject to management under this part.

(b) *Batteries not covered under 40 CFR part 273.* The requirements of this part do not apply to persons managing the following batteries:

(1) Spent lead-acid batteries that are managed under 40 CFR part 266, subpart G.

(2) Batteries, as described in §273.9, that are not yet wastes under part 261 of this chapter, including those that do not meet the criteria for waste generation in paragraph (c) of this section.

(3) Batteries, as described in §273.9, that are not hazardous waste. A battery is a hazardous waste if it exhibits one or more of the characteristics identified in part 261, subpart C of this chapter.

(c) *Generation of waste batteries.* (1) A used battery becomes a waste on the date it is discarded (e.g., when sent for reclamation).

(2) An unused battery becomes a waste on the date the handler decides to discard it.

[60 FR 25542, May 11, 1995, as amended at 64 FR 36488, July 6, 1999]

§273.3 Applicability—pesticides.

(a) *Pesticides covered under this part 273.* The requirements of this part apply to persons managing pesticides, as described in §273.9, meeting the following conditions, except those listed in paragraph (b) of this section:

(1) Recalled pesticides that are:

(i) Stocks of a suspended and cancelled pesticide that are part of a voluntary or mandatory recall under FIFRA Section 19(b), including, but not limited to those owned by the reg-

istrant responsible for conducting the recall; or

(ii) Stocks of a suspended or cancelled pesticide, or a pesticide that is not in compliance with FIFRA, that are part of a voluntary recall by the registrant.

(2) Stocks of other unused pesticide products that are collected and managed as part of a waste pesticide collection program.

(b) *Pesticides not covered under 40 CFR part 273.* The requirements of this part do not apply to persons managing the following pesticides:

(1) Recalled pesticides described in paragraph (a)(1) of this section, and unused pesticide products described in paragraph (a)(2) of this section, that are managed by farmers in compliance with 40 CFR 262.70. (40 CFR 262.70 addresses pesticides disposed of on the farmer's own farm in a manner consistent with the disposal instructions on the pesticide label, providing the container is triple rinsed in accordance with 40 CFR 261.7(b)(3));

(2) Pesticides not meeting the conditions set forth in paragraph (a) of this section. These pesticides must be managed in compliance with the hazardous waste regulations in 40 CFR parts 260 through 272;

(3) Pesticides that are not wastes under part 261 of this chapter, including those that do not meet the criteria for waste generation in paragraph (c) of this section or those that are not wastes as described in paragraph (d) of this section; and

(4) Pesticides that are not hazardous waste. A pesticide is a hazardous waste if it is listed in 40 CFR part 261, subpart D or if it exhibits one or more of the characteristics identified in 40 CFR part 261, subpart C.

(c) *When a pesticide becomes a waste.*

(1) A recalled pesticide described in paragraph (a)(1) of this section becomes a waste on the first date on which both of the following conditions apply:

(i) The generator of the recalled pesticide agrees to participate in the recall; and

(ii) The person conducting the recall decides to discard (e.g., burn the pesticide for energy recovery).

(2) An unused pesticide product described in paragraph (a)(2) of this section becomes a waste on the date the generator decides to discard it.

(d) *Pesticides that are not wastes.* The following pesticides are not wastes:

(1) Recalled pesticides described in paragraph (a)(1) of this section, provided that the person conducting the recall:

(i) Has not made a decision to discard (e.g., burn for energy recovery) the pesticide. Until such a decision is made, the pesticide does not meet the definition of "solid waste" under 40 CFR 261.2; thus the pesticide is not a hazardous waste and is not subject to hazardous waste requirements, including this part 273. This pesticide remains subject to the requirements of FIFRA; or

(ii) Has made a decision to use a management option that, under 40 CFR 261.2, does not cause the pesticide to be a solid waste (i.e., the selected option is use (other than use constituting disposal) or reuse (other than burning for energy recovery), or reclamation). Such a pesticide is not a solid waste and therefore is not a hazardous waste, and is not subject to the hazardous waste requirements including this part 273. This pesticide, including a recalled pesticide that is exported to a foreign destination for use or reuse, remains subject to the requirements of FIFRA.

(2) Unused pesticide products described in paragraph (a)(2) of this section, if the generator of the unused pesticide product has not decided to discard (e.g., burn for energy recovery) them. These pesticides remain subject to the requirements of FIFRA.

[60 FR 25542, May 11, 1995, as amended at 64 FR 36488, July 6, 1999]

§ 273.4 Applicability—Mercury-containing equipment.

(a) *Mercury-containing equipment covered under this part 273.* The requirements of this part apply to persons managing mercury-containing equipment, as described in §273.9, except those listed in paragraph (b) of this section.

(b) *Mercury-containing equipment not covered under this part 273.* The requirements of this part do not apply to per-

sons managing the following mercury-containing equipment:

(1) Mercury-containing equipment that is not yet a waste under part 261 of this chapter. Paragraph (c) of this section describes when mercury-containing equipment becomes a waste;

(2) Mercury-containing equipment that is not a hazardous waste. Mercury-containing equipment is a hazardous waste if it exhibits one or more of the characteristics identified in part 261, subpart C of this chapter or is listed in part 261, subpart D of this chapter; and

(3) Equipment and devices from which the mercury-containing components have been removed.

(c) *Generation of waste mercury-containing equipment.* (1) Used mercury-containing equipment becomes a waste on the date it is discarded.

(2) Unused mercury-containing equipment becomes a waste on the date the handler decides to discard it.

[70 FR 45520, Aug. 5, 2005]

§ 273.5 Applicability—lamps.

(a) *Lamps covered under this part 273.* The requirements of this part apply to persons managing lamps as described in §273.9, except those listed in paragraph (b) of this section.

(b) *Lamps not covered under this part 273.* The requirements of this part do not apply to persons managing the following lamps:

(1) Lamps that are not yet wastes under part 261 of this chapter as provided in paragraph (c) of this section.

(2) Lamps that are not hazardous waste. A lamp is a hazardous waste if it exhibits one or more of the characteristics identified in part 261, subpart C of this chapter.

(c) *Generation of waste lamps.* (1) A used lamp becomes a waste on the date it is discarded.

(2) An unused lamp becomes a waste on the date the handler decides to discard it.

[64 FR 36488, July 6, 1999]